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THE ENGLISH CONSTITUTION

WITH AN INTRODUCTION

BY THE RIGHT HON. LORD HEWART OF BURY

LORD CHIEF JUSTICE OF ENGLAND

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INTRODUCTION

THE English Constitution as it exists to-day is the result of a continuous process of development throughout many centuries. It consists of rules and principles which are in part statutory, in part founded on the Common Law, and to a large extent mere usages not having the force of law. The exercise of some of the most important powers of the Crown is governed wholly by conventions or usages. The Cabinet System and the principle of Ministerial Responsibility are also wholly conventional, as are the relations between the Crown and the Cabinet, and between the Cabinet and the Houses of Parliament. But, though the breach of a convention of the Constitution is not in itself a breach of any rule of law, it will be found on examination that the law is the ultimate sanction for the observance of the conventions. This topic, however, requires too much examination of detail to be explained here.

One leading feature of our Constitution is its flexibility. In so far as it consists of rules of law, it is liable to modification to any extent by an Act of Parliament, passed in the ordinary way without any special formalities or any referendum to a popular vote. In so far as it is dependent on convention, it can be altered by the adoption of new usages. In this important matter of flexibility it differs from written constitutions, such as that of the United States of America, which are said to be rigid, and can be modified only by some extraordinary process of legislation laid down in the

Constitution itself. The comparative merits and demerits of this quality of flexibility are a subject upon which there is undoubtedly room for differences of opinion.

The most fundamental characteristic of the Constitution is the Rule of Law, that is to say, the supremacy of the ordinary law of the land, administered by independent judges in a regular course of procedure, over all other powers in the State, and the subjection to the same law of all government officials as well as private citizens. There is not here any system of administrative law, such as is to be found on the Continent, whereby disputes in which servants of the Government are concerned are decided in accordance with a special system of law, and in special Administrative Courts. The principle of the Rule of Law is really the security for what are often called the liberties of the subject—the right to personal liberty, secured by the writ of habeas corpus, except in case of a contravention of the law; the right of freedom of speech, subject to the law of libel, sedition and slander; the freedom of the Press; and the right of public meeting and public discussion.

One of the most interesting chapters in the history of the Constitution concerns the growth and development of the Cabinet System in the last two centuries. The Cabinet, although the most important and powerful instrument of government in the State, is, and has always been, a body wholly unrecognised by law. In its origin it was an informal committee selected by the King from the Privy Council to advise him in the work of government. At first its members were not necessarily members of the legislature, and they were responsible to the King alone, though they might be impeached if they gave what Parliament thought to be

bad counsel. The Act of Settlement contained a provision that, on the accession of the House of Hanover, no person who held an office of profit under the Crown should be capable of serving as a member of the House of Commons. But, before this provision came into operation, it was so clearly recognised that the presence of Cabinet Ministers in the Legislature was advantageous, that, by an Act of 1706, the prohibitive clause was repealed, and it was provided instead that members of the House accepting offices of profit under the Crown should vacate their seats, and (with certain exceptions) should be capable of re-election. This vacation of seats was finally abolished in 1926.

After the Hanoverian succession it became the practice to select Ministers exclusively from persons who held the same political views, and by the end of the 18th century the Cabinet had become a body of members of the Legislature professing the same political opinions, and chosen from a party that was able to command a majority in the House of Commons. The Ministry, if it ceased to possess the confidence of the House of Commons, as indicated by a vote of censure or by an adverse vote on an important question of policy, was constitutionally bound either to resign or to appeal to the electorate by means of a dissolution of Parliament. It is this system which is in operation to-day. If a Ministry attempted to remain in office in defiance of the House of Commons, the House, which has the exclusive control of the public finances, could render government impossible by refusing the necessary supplies. It is the Cabinet which settles the programme of legislation to be submitted to Parliament each session, and, since the Parliament Act of 1911 limited the powers of the House of Lords, it seems true to say that, although theoretically the King in Parliament is the legislative sovereign and

the King in Council the executive sovereign, in reality the whole legislative power and the whole executive power are substantially vested in the Cabinet, provided only that it is able to command a majority in the House of Commons.

In this little book the reader will find a clear and concise account of the various political institutions which collectively constitute the English Constitution, and an explanation of the leading rules and principles governing those institutions and their relations to one another, in language that can be understood by that important and prevalent person, the man in the street.

HEWART.

WHENCE did this happy organisation first come? Was it a tree transplanted from Paradise, with all its branches in full fruitage? Or was it sowed in sunshine? Was it in vernal breezes and gentle rains that it fixed its roots, and grew and strengthened? Let History answer these questions. With blood was it planted; it was rocked in tempests; the goat, the ass, and the stag gnawed it; the wild boar has whetted his tusks on its bark. The deep scars are still extant on its trunk, and the path of the lightning may be traced among its higher branches. And even after its full growth, in the season of its strength, when its height reached to heaven, and the sight thereof to all the earth, the whirlwind has more than once forced its stately top to touch the ground; it has been bent like a bow, and sprang back like a shaft. Mightier powers were at work than expediency ever yet called up; yea, mightier than the mere understanding can comprehend.

COLERIDGE (*Lay Sermons*).

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THE ENGLISH CONSTITUTION

A CONVERSATION

F. A foreigner.
N. A native.

F.: As you know, Mr. N., I have now been in England some time, and I have been taking advantage of the opportunity to study your remarkable system of government. But I am still puzzled about several things of a rather elementary kind. Will you let me ask you some questions?

N.: Please: I will do my best to answer. I only hope they won't be beyond me.

F.: Well, to begin with: is this country a democracy or a monarchy?

N.: Surely both. It is certainly a democracy because our government rests upon the widest public opinion. All British subjects, resident in this country, who are not minors, lunatics, or criminals, have a share in deciding what Ministry shall be in office; and the Ministry for the time being is practically omnipotent. Then, also, it is a monarchy because we have a king.

F.: But if you are a democracy, how do you explain, for example, the House of Lords? And what part do you find for the King to play?

N.: I must take these questions one at a time. The subject of the House of Lords is somewhat of a party

question; which means that we are still thinking about it—though not very intensely.

F.: Yet the House of Lords is surely very conspicuous; and to foreign eyes it does not look at all democratic. What are you thinking about it?

N.: I daresay there are many opinions floating about. I think I can best answer your question by trying to state two points of view.

A Radical would be disposed to sympathise with your difficulty, and to say that the House of Lords is an anomaly and an anachronism. He would say that to allow any sort of political power to a company of men, however dignified, on the ground of their birth, would be unreasonable, even if our object was to be ruled by superior beings. It is absurd for a nation which believes in, or is, at least, committed to, popular goverment. Democracy, he might argue, rightly expects its rulers to prove their title in the tournament of political life, and to demonstrate their superiority by their powers of persuasion and leadership. Our Radical would probably go on to say that our Constitution has now apparently settled down to being a code or machine for securing fair play between two or three national parties; and it is difficult to see what place an institution can properly occupy in the schemes almost all of whose members appear, by a kind of prescriptive necessity, to belong to one party.

F.: These seem sensible reflections.

N.: Yes; but you must hear the other side. The Conservative says something to this effect: "It is evident that the House of Lords is a survival from a time when the real centre of political gravity was very different from what it is to-day. At one time it was the obviously appropriate machinery for enabling the Crown to consult the most powerful interests in the country—

the Church and the aristocracy. Those days are past. But we are well accustomed in England to adapting old institutions to new uses. And the use of the House of Lords to-day is to correct the obvious defects of the party system. The chief of these defects lies in the inadequacy of general elections as a means of consulting the people. The choice of the elector is confined to two or perhaps three candidates, whose party programmes cover a wide range of heterogeneous subjects. If the elector's opinions cut across these official divisions, as they often must, he has no adequate means of expressing them. A party may in this way easily come into office with an apparent mandate for a measure or policy which is in reality distasteful to a majority of the nation. Then there are the new questions which are brought up during the life of a Parliament, on which the electorate has not been consulted even in form. We are in danger," they say, "of realising the fable of King Log and King Stork, and seeing our constitutional monarchy replaced by a system of Front Bench autocracy. It is the business of the House of Lords to save true democracy by preventing the legitimate authority of the electorate from being usurped by the party organisations. The Lords, by rejecting an important Government measure, can force it into the forefront of party issues at the next election; and the Parliament Act is only too adequate to prevent this power being abused. And do not forget," our Conservative would go on, "that the House of Lords, like the House of Commons, exists for other purposes than those of passing, amending, or rejecting bills. Its debates are chiefly conducted by men of distinction and wide experience of public affairs, and form a valuable contribution to 'consultative government.' The House of Lords has a moral authority in the country, and makes no claim to any

other." Some Conservatives, I should add, think that this moral authority can and should be strengthened by a reform in the constitution of the Upper House, reducing the hereditary element and increasing the proportion of 'novi homines.'

F.: What do your Radicals say to that?

N.: I imagine they say various things. They doubtless say, for example, that the Lords are unsatisfactory judges of the measures upon which a more definite popular verdict is desirable.

F.: Do they, then, want to abolish the House of Lords and do without a Second Chamber?

N.: Nobody nowadays talks about abolishing the House of Lords. It is not the fashion, in English politics, to take bulls by their horns, particularly when they appear to be harmless. You must remember that the principal concern of English statesmen, when they are preparing electoral programmes, is to gather in the votes of the neutral-minded and the apathetic. So they usually think it desirable to minimise the novelty of their proposals and to represent them as being no less safe than they are beneficent. It would be surprising if there were to be any further movement from the left against the House of Lords, unless there were to be another serious conflict between the two houses; and the Parliament Act seems to make this improbable.

F.: Then I suppose your Radicals agree with your Conservatives in wanting the House of Lords to be reformed.

N.: Not at all. I doubt whether you would find many Radicals who are eager to see a change in the composition of the House of Lords.

F.: I confess that you surprise me. Am I to understand that the Conservatives are in favour of important

changes in the Constitution, and that it is the Radicals who want to stand fast in ancient ways?

N.: Perhaps I have led you to exaggerate the strength of the wish of the Conservatives to alter the composition of the Lords. Many people realise that if you start tinkering with the subject, you inevitably raise the whole question of hereditary right as a matter of principle. It has been suggested, for example, that the peers might elect a small number from among their own body to sit in Parliament. But this proposal at once raises the question why either electors or elected should be artificially limited to a circle which is, after all, accidental. There is a prodigious difference between an institution which is content to be calmly historic, and an institution which purports to be a clever solution of contemporary controversies.

F.: You are now telling me why people who like the House of Lords as it is hesitate to put it into the melting-pot. You have not answered my question why Radicals do not want to make some change.

N.: I think there are various reasons. One is that Radicals think that to reform is to strengthen; there they seem to differ on a calculation of fact from those Conservatives of whom I spoke just now, who think the opposite. And thinking that to reform is to strengthen they are afraid that any reinforcement of the Upper House must be at the expense of the House of Commons and of the whole fabric of popular government. Then, again, you must remember that your Radical is the man who, by temper of mind, is inclined to think of governments what the man in the street thinks of bureaucrats, that they are always too late and too slow, and that the world goes round too fast for them; so that at the best, he takes but little interest in artificial devices for delay. And, finally, most Englishmen feel

a certain aversion for theoretical and artificial arrangements in politics.

F.: Of course it is always said that the Englishman avoids thinking unless he is obliged to do so.

N.: Well, we shouldn't admit that. What we prefer to believe about ourselves is that we think a good deal, but always with our eyes fixed on the object. We think that the highest merit which an arrangement can have, whether it be a political constitution or a railway time-table, is that it works. And it appears to us to be the wisest kind of thinking on practical subjects to recognise and to appreciate this quality.

F.: Don't you find that you are often tempted to think that institutions are working simply because they are not attracting attention?

N.: I don't know why you say "tempted." It strikes me as sensible. Surely it is a good rule that institutions should be seen but not heard.

F.: You make me feel what a stranger I am. I should have thought that efficiency was a desirable quality, and that it was not adequately tested by the absence of creaking. The machine may have stopped.

N.: Of course I agree. And I am sure that we should all like the House of Lords, not to speak of the House of Commons, to be more efficient. But there is a great deal to be said for letting sleeping dogs lie.

F.: You have a good many sleeping dogs in England.

N.: The country is full of them.

F.: Not to speak of sleeping lions, too, I daresay.

N.: What do you mean?

F.: I was going to ask you about the monarchy. What does it really come to in the practical working of your Constitution? Is it little more than what I believe you call "Wardour Street," a theatrical property, or is it an effective, indispensable part of the machine?

N.: Now listen to me. I want to move your mind through about ninety degrees of the circle, so that you can see our Constitution as we see it, and as it is. In your own country your constitutional life goes back to a rather recent revolutionary settlement—as, indeed, does that of most other countries in the world. You look upon your constitutional arrangements as resting on the definite reasons and calculations of modern fallible men. They represent the victory of one party, and the defeat, exile, and proscription of another. The victorious party now includes, no doubt, the great majority of your nation; but it still has opponents, who make themselves heard from time to time, and who show no greater respect for the present Constitution of your great nation than is generally felt by politicians for the devices of their opponents. Consequently your Constitution is expounded and explained by its admirers—that is, I agree, by most reasonable people—as any other modern invention is explained and justified, by opportunist reasons disguised as principles. It has the same sort of prestige, the same sort of anchorage in your minds, as the design of your latest battleship, or the structure of your scientific tariff. Am I exaggerating?

F.: Yes, a good deal. Our Constitution has other supports than pedantic and factitious theorising. It represents great and necessary reforms; and it would have much less authority than it has if it were not obviously imitated from your own—except, of course, that we have no King.

N.: I think that scores to me. We have seen in Italy what can easily happen to a constitution which rests on grandpapa's revolution and the imitation of England. But let me make my point.

I should compare our Constitution, as it exists in the country of its origin, to something like the human

body or the English language. It is one of those entities of which I can imagine the schoolmen saying that its existence is the greatest of its attributes. Who would begin a lesson on the human body by pointing out that it is good for running, climbing, and using tools, but bad for flying, diving, and the consumption of grass? Or on the English language by saying that while it is an excellent vehicle for poetry, it is deficient in pronouns and too patient of parliamentary drafting? The most commanding characteristic of the body, as of the language, is its vitality, shown not only in its innate force and toughness, but by its adaptability to changing surroundings. Our Constitution is conspicuous for these same qualities.

F.: I am surprised to hear you using such mystical language. I thought the organism was out of fashion.

N.: I don't think I am being mystical. A mystic is a person who attributes effects to unknowable causes. The causes of the English Constitution are all knowable. They are all to be found in the devices and habits of the inhabitants of this island. But these devices and habits have worked together over a long period of time to produce an imposing and complex social fact; a fact which could not have been produced in a single generation by any convention of constitution-mongers writing on a clean slate.

F.: And the Monarchy, you are going to say, is the figurehead of this imposing product of heaven-directed evolution, and consequently it is, to use the German philosopher's expression, "jenseits des Guten und Bösen"—beyond good and evil?

N.: It would be untrue to say that there is no discussion among us of the value of the Monarchy in the national life. But it is discussed, when it is discussed, not as a constitutional device, but rather as a trait in

the national character, as an old and ingrained social habit.

The English Monarchy is a vividly imposing phenomenon, which has a great hold on the national imagination. It is this, rather than any theory of its distinctively political functions, which enables it to render the great service which it undoubtedly does in fortifying the sense of unity between the different nations of the empire. The less it has to do with politics, the stronger the sentiment it excites, and the less we canvass it.

F.: Do I understand you to mean that your government is now in effect a republic?

N.: A monarchical republic, perhaps. But in trying to understand any constitution, and particularly ours, one of the most important things you have to inquire into is the nature of its relation to other parts of the national life. You must ask what feelings it appeals to, what support it derives from its connection with the unpolitical part of life, which is the larger part. In England, of all the thousand links between our political constitution and the broad stream of common interests of which it is only a part, the Monarchy is one of the strongest.

F.: You mean to say that one can't describe the English Constitution without describing England?

N.: Precisely. The permanent and stable thing in our Constitution is a certain temper in our national life, of which it is the outcome and not the cause. The Constitution is a state of mind. When, once upon a time, we lost our tempers, and had a fight to a finish, we were compelled to realise, before very long, that we could not establish anything permanent in that mood, and must retrace our steps.

F.: What conservatives you are!

N.: Yes; but not perhaps quite in the sense you mean.

It is normal for human beings to be attached to familiar things, particularly if they are dignified, picturesque, and interesting. And though it is possible to think that some of the yeast in the English national temper has been exported, to make America and the Empire, it is open to question whether in reality we are more conservative than the French, for example. Our habit of putting new wine into old bottles is due, not so much to an exceptional attachment to antiquity, as to the fact that we have been able to avoid great amputations in the body politic; that few skeins have been cut; and when we seem to be respecting the dead, we are in reality respecting our fellow-citizens.

* * * * *

F.: Do you think that your Constitution could be improved, Mr. N.? You have explained to me that, as it stands at present, it is the outcome of a continuous process of adjustments, of grafts, upon a system originally devised in the Middle Ages, and that these adjustments have always had a political motive and occasion. I think I appreciate the merits of this method. But it may have its defects. May it not be that it gives effect chiefly to those movements which are interesting to political parties, that is to say, to those citizens whose political zeal, however laudable, is somewhat—what shall I say—topical; lacking in far-sighted sagacity?

N.: In a broad sense that is perhaps true. Indeed, at the present day the only movements for constitutional reform which show any vitality—that for a reform of the House of Lords and that for a reform of the electoral system—derive some part of their moderate degree of energy from preoccupations of party interest. But you must not expect me to get so far out of my English skin as to be warmly interested, or to think there is

much sense, in inventing a priori constitutional reforms. You see the whole thing rests upon the interest which our people happily take in public affairs. Our government is the expression of that interest; and our system is the channel which the stream has made for itself. As King Canute discovered, water will not flow where theorists or even kings tell it to. Our government is a popular government, which means that it is strong, stable, opportunist, amateurish and hand-to-mouth.

F.: I feel rebuked. And, seriously, I think it is true that you have brought what I may call the "popularity" of your government to a high state of perfection. Your Parliament seems particularly serviceable as an instrument for publicity and for contact. But let me stick to my point. And as you seem rather coy, I am going to be blunt. Are you quite sure that the Constitution is not in danger of being put on the shelf? The King has suffered apotheosis; the House of Lords is in a state of suspended animation; and the House of Commons seems more than half submerged in a flood of business which it does not control. Is not the real government of the country passing to the Civil Service?

N.: I don't at all agree. The country is governed by the Cabinet, deriving its authority, as the Constitution prescribes, from a popular vote; and it shows no sign of losing its power. As for the Civil Service, I agree that it is a potential power in the national life, the full effects of which have probably not yet been felt; but I am so far from agreeing that the effective control shows any sign of passing to it, that on the contrary I am sometimes surprised that its influence is not greater. It is remarkable, to my mind, that constitutional and official proprieties should be so effective as they seem to be in suppressing, or at least veiling, the influence of a profession, potentially as powerful as the

law, or as the Church used to be, whose members know more about the national business than anyone else. No; I think that parliamentary government still holds its own.

F.: So everything is for the best, in the best of all possible worlds.

N.: Come now, I have never said that. It is realism, not romance, which ties my tongue. But I don't mind admitting that the merits of our Constitution are to be found where you would expect to find them, in the department of politics; and I am not indisposed to think that the political machine tyrannises over some things which would be better managed if they were somewhat freer from its domination.

F.: In any other country you would be speaking of patronage.

N.: But not in this country, thank Heaven. I mean legislation.

F.: You tell me that politics have too much to do with legislation?

N.: Just that.

F.: You mean to say—it is certainly very different from anything I had imagined—that your laws are made at the dictation of sinister influences?

N.: Good gracious, no; nothing of that sort. Our laws are made from the most elevated motives, by the most incorruptible and public-spirited men. But nobody thinks that they are very well made. Legislation is a fine art, like engineering or surgery; but it is an art which has little opportunity of development in England. Our only working machinery for making laws is monopolised by the necessities of party government and the convenience of the administrative departments. It should be much easier than it is to carry through Acts which are of no party advantage. Only so can there be

any hope of bringing some order into the jungle of the Statute Book, and correcting the vagaries of the Common Law. . . . But hush! we must stop talking. The book is just going to begin.

F.: What book?

N.: The book we are in.

F.: But I can't stop here all night listening to a book.

N.: I'm afraid you'll have to. The doors are shut, and you and I must stay here till the end. I'm told it's quite short and elementary, and it may clear up your ideas a little.

F.: What about?

N.: Patience.

CHAPTER I

INTRODUCTORY

§ 1

THE collection, of which this book is one, has for its purpose to tell, in a brief and popular form, the principal achievements of more than a thousand years of English civilisation. Of these achievements none is a more proper subject for national pride than our living tradition of constitutional government; we may, indeed, be confident that when the historian of the remote future comes to estimate the contribution of England to the common stock of civilisation, his principal emphasis will be laid upon our political constitution. Whatever transformation our frame of government may be destined to pass through in the future, whether or not we continue to display sagacity in the invention of institutions and in their adaptation to meet new needs, the impression which the English Constitution has already made upon the world is great enough to secure for it a place second to no rival in the history of political achievements. Of the many systems of free and popular government in operation in the world to-day, there are few, if any, which do not bear, in a variety of features, the unmistakable marks of derivation from the Constitution of England in some stage of its development from 1688 to the present day.

§ 2

We need not hesitate to acquiesce in the general opinion that England has been fortunate in her political history. There has been much strife, much cruelty and oppression, long periods of relapse or inertia; but, taking the story as a whole, it tells a remarkable tale of progress to ordered freedom, and of the progressive conciliation of the rival and ever-growing claims of the State on the one hand and of the individual on the other. It is not too much to say that the steady evolution of the English Constitution, furnishing at the last, as it has done, an inheritance of political ideas in which all mankind has shared, is one of the principal causes of the modern belief in the necessity of human progress. But whether or no this belief be well founded, it cannot by itself satisfy our minds as an explanation of the constitutional history of England. Here there were forces at work, or combinations of forces, producing unique and admirable effects which are scarcely to be found home-grown anywhere else.

Is it possible to point out any general causes for this good fortune? The answer may be looked for in three directions: in the national character; in geography; and in what we will call accident.

§ 3

First for geography, whose contribution, if not the most important, is the simplest. The land of which England occupies the greater part is an island; and that greater part is itself comparatively small. Being an island our country has, save for insignificant raids, escaped foreign invasion for nearly nine centuries, and during that time has but rarely had even to concern

itself with such a danger. The effect of perpetual Turkish wars on the infant liberties of Hungary, and of the Hundred Years' War on those of France—to take only two examples—sufficiently point the moral. The size of our country again, which, compared with France, is small, may well have played its part in making it easier for the King's writ to run in all parts of the realm, in making attendance at the National Council a less intolerable burden, and in enabling great men to stand with one foot on their estates and the other in the King's court. All these things made for the closer political knitting of the country; and the more easily men can meet together for common concerns, the more likely are they to create a stable society.

§ 4

Next for accident: At the head of this very arbitrary category we may put the Norman Conquest, that fundamental mercy which secured for us, long before any other European country, a united kingdom under a vigorous and gifted race of rulers. In the same chapter of accidents we may perhaps place the fact that we escaped, twice over, though but narrowly, the dangers offered by great foreign possessions. Had our kings succeeded in holding their French provinces and in occupying Paris, England might have sunk to the position of a mere satellite in the troubled system of the Anglo-French continental monarchy. Cornwallis's surrender at Yorktown averted another peril to our liberties; namely, that we might still have been holding America when the great resources of the Mississippi Valley and the West were opened out, and before our Constitution had been popularised. The consequence might well have been such a flood of American wealth as would

have repeated for our country the fate of the Roman Republic. It is impossible to exhaust the tale of events in our history which might have fallen out worse for our national liberties than, in fact, they did. The defeat of the Spanish Armada was helped by a storm. Professor Trevelyan has imagined the calamities which would have befallen us had Napoleon won the day at Waterloo.

The Muse of History, in fact, is something of a snob. She looks at the past from the standpoint of races and institutions which have survived, and, in the case of England, she has to explain the process by which our nation attained a striking measure of the common objects of national ambition—power, wealth, order, culture, and freedom. It is natural for the historian who has so much of success to account for to think that the right side won every battle, and that if there were any accidents they were happy. That progress has sometimes been delayed, as by the Napoleonic wars, or achieved at regrettable cost, as in the great Rebellion, he is, of course, ready to admit; but to believe that we are still suffering from the consequences of ancient and irremediable follies or misfortunes—that is more difficult. It is only when we come down to quite modern times, to issues not yet settled, that we find it easy to believe that powerful men or movements, whose immediate objects have been attained, have, after all, been mistaken, and that with wiser counsels, or with better luck, we should to-day have been better off.

From this constrained piety it is not easy to free our minds, even when awareness of it makes us sceptical. We must needs applaud what seem to be the causes of good fortune; and it is beyond our powers to calculate with any plausibility the imaginary consequences that might have ensued if our ancestors had

lost the battles which in fact they won, or if victorious policies had failed. All the same, there is something unsatisfactory in complete surrender to fatuous optimism; and it is impossible to feel that we are really comprehending the process and the outcome of our history unless we are ready to think that we have not always and in all respects been fortunate.

In these uncontroversial pages it is difficult to give examples; but we may, perhaps, regret that we never had a John Knox to give us a national system of popular education in the sixteenth century; or that Charles the First did not save us from reaction by running away, like his younger son.

§ 5

Of greater interest is the subject of national character. We cannot take a pride in mere good fortune, and it is natural to wish to believe that the political achievements of past generations have been due not only, or mainly, to the favour of external and accidental circumstances, but rather to inbred racial qualities. Qualities which have been handed down may be handed on; and confidence in the national character fortifies faith in the future. But our positive knowledge on the subject is small, and the faint rays of certain truth are dimmed by much natural sentiment. The anthropologists have made little progress in the study of race; they measure skulls and classify mankind by the colour of their hair and eyes, and even by the peculiarities of their blood corpuscles. But who knows either how permanent these physical characteristics may be, or what connection they have with the qualities of the mind? What, again, are the effects of climate? It is easy to believe that the native Patagonians will never produce, at any rate so

long as they stay in their own country, a Hampden, or a Burke, or a Wellington; but it is difficult to believe that the original physical characteristics of the Englishman are very different from those of other Western Europeans. And the historian feels something of the same dislike of explaining political institutions by national character that the biologist does in accounting for the phenomena of life by the Vital Principle. It is too easy.

§ 6

We may, however, agree, without running too great a risk of being deluded by patriotic piety, that the human material which, when the mingling of Briton, Saxon, and Norman was completed, was offered by our race to the moulding hand of history, was endowed with great physical, moral, and mental vigour; and that the race thus compounded inhabited a country whose climate, with its rapid variations between moderate extremes, was propitious to the preservation and display of its energies.

But it seems difficult to point with any confidence to original inbred specific differences between the makers of our country and those few other peoples with whom we may naturally compare them. The Englishman, as a political animal, is said to be law-loving, loyal to his leaders, indifferent to equality, deferential, a lover of liberty, sectarian, individualist, zealous for business, apt for self-government, a lover of compromise, a fertile maker of rules, indifferent to logic, respectful of precedent. If, in the thirteenth century, it had been the common judgment of Europe that Englishmen were conspicuous for this strange assortment of qualities, the only puzzle would be that Cabinet government, ministerial responsibility, a popular suffrage, and the

party system were not established forthwith. It is, in fact, evident that the political character of the English people has been slowly hammered into shape on the anvil of its own experience; and that this experience has largely lain in the working of the institutions which it has itself established, or which the policy of its kings has disciplined it to administer. Of these institutions which, through long generations, have educated those who served them, the most important have been the jury, parliament, the office of Justice of the Peace and, we may perhaps add, the non-conformist sects.

§ 7

In what does the achievement of the English Constitution consist? It seems to lie essentially in the reconciliation of two distinct and almost inevitably conflicting things—policy and law. A tribe or nation which is sufficiently organised to be able to pursue a policy, to resist aggression, physical or moral, to assert its will in the world, to carry out common purposes which involve change within or without—such a society must of necessity acknowledge and obey some ruling power in its midst which exercises a wide freedom in command. But unquestioning subjection to a sovereign dictatorship, intent on policy, is incompatible with the security of those human ties and private expectations and assurances in which morality and happiness are most immediately engaged. The conflict between *salus populi* and *justitia* is as old as history and doubtless older. Except when disorder, corruption, or a general decay of vigour, has so depressed the national life that policy and law have been equally in abeyance, the balance has swayed in the history of civilised peoples, sometimes to one side, and sometimes to the other—policy perhaps

predominating. Rome under the Cæsars, France under Louis XIV, Italy under Mussolini, are examples of vigorous states acquiescing in the untrammelled ascendancy of policy; so, also, though in a much more tempered degree, was England under the Tudors. In the eyes of their admirers such states are organised for and devoted to the unconstrained pursuit of general public purposes, such as national aggrandisement, the establishment of true religion, or the realisation of Utopia. In the converse, more static, stage of society, government is primarily directed to the preservation of existing interests and traditional standards of right and wrong. Such a society is chiefly inspired by the ideal of stable law, and finds little place for the plans of capable and far-sighted men. The conflict between these two divergent ideals has formed, since the early middle age, one of the principal themes of European history: in England alone has the instinctive attachment for law as the regulator of government, so strongly felt throughout the West eight centuries ago, survived the break up of the old order of ideas, and the creation of the modern state. It was reserved for the English people, in the slow and chequered progress of conflict and experiment which made their political life, to work out the solution of the problem how so to conduct the affairs of the nation as to combine the benefits of a vigorous and purposeful administration with a diligent solicitude for principle and private right. The rules and institutions by which this balance is secured and expressed, taken altogether, make up our Constitution.

§ 8

Lord Chatham once said: "We all know what the Constitution is." He was mistaken. Most of his hearers

would have been hard put to it to say with any precision what the Constitution was in their own day. And it is no easier to define the very different Constitution by which we are governed at the present time. We all know that the Constitution consists of certain rules which govern the government. But where are those rules to be found? Whence do they derive their authority? By what marks are they to be distinguished from rules which are not parts of the Constitution? These are difficult questions, to which, however, we must try to find the answer.

§ 9

It will be a convenient introduction to the subject to look first at the Constitution of another country with which we share so many legal and political traditions, namely, America. The Constitution of the United States offers contrasts with our own which are as instructive as they are profound. This great Statute, which came into force in 1788, provided for the federation, under a national government, of the thirteen original States, and of such new states as might be formed in the future. It consists of seven articles; and the fifth of these provides that amendments to the Constitution shall require to be ratified by the legislatures, or constitutional conventions, of three-fourths of the States which at the time compose the Union. In accordance with this article there have since been added to the Constitution nineteen amendments. These seven original clauses, together with the amendments, make up the whole Constitution of America. Whatever they prescribe, explicitly or by necessary implication, is a constitutional law; and, strictly speaking, nothing else has that character. Furthermore, the Constitution differs in

authority from any other law: it reigns supreme, and any law passed by the Federal Congress, or by any State legislature, which can be shown to conflict with the Federal Constitution, goes to the wall; the courts will disregard it.

These things are not true of the Constitution of England. Its provisions are not to be found in any single State document or definite collection of documents. There is no law in the English Statute Book of which we can say that, since it is part of the Constitution, it cannot be altered except by some unusual procedure. If it was proposed that in order to effect a change in the Constitution it should be necessary to submit the question to the nation in some exceptional manner as, for example, by means of a referendum, the proposal would be impracticable, because it would first be necessary to do what we have never done, and should find it very difficult to do, namely, to agree what exactly are the laws or rules which, being constitutional, could only be altered in the proposed new way. No English court of law could refuse to enforce a statute on the ground that it conflicts with the Constitution. Parliament could, if it chose, repeal, in its next session, Magna Charta, the Bill of Rights, and the Act of Settlement. It could abolish itself, King, Lords, and Commons, and hand over the government to the Trade Union Council or the League of Nations, in the same forms as those by which it would amend the constitution of the London County Council. There might be political objections to such a course, but the objections would be only political.

§ 10

Tocqueville, a great admirer of our institutions, was so much impressed by this contrast between the English

and the American plan of government that he went so far as to deny that we have a Constitution at all. And, indeed, if it were not the case that we invented both the name and the thing, this doubt would have something to be said for it. It would, however, be absurd to say that England, of all countries in the world, has not got a Constitution. What we have to recognise is that it is not a necessary character of a Constitution that it should consist of a formal and precise code of laws, made and changeable in a manner peculiar to themselves. With us, the boundaries of the Constitution are set by a certain type of political sentiment, what we may call the "constitutional sense" of the nation. To a minor extent also we must allow that the current usages of the language bring some things into the scope of the Constitution which, tested only by our "constitutional sense," might not seem sufficiently permanent or important. Before seeking to follow the boundary lines along which this sense and these usages will lead us, let us first see, however, what is the subject-matter with which they are concerned.

§ 11

The Constitution consists of some, but by no means all, of the rules which govern the government. These rules are of three kinds. Rules of law; the "Conventions of the Constitution"; and certain more general and less specific principles which relate to the liberty of the subject; let us call them principles of liberty.

(1) Rules of law; these include:—

(*a*) Rules of the Common Law.—It is from the Common Law, for example, that the King derives his prerogatives, and that Parliament derives its legislative supremacy.

(*b*) Rules of Statute Law.—The order of succession to the Throne, the powers and duties of many of the departments of State, the duration of parliaments, the power of the House of Commons, in certain events, to overrule the House of Lords, the qualifications of parliamentary electors, the tenure of office of the judges—are matters regulated by Statute.

(*c*) The law, or so-called "privileges" of Parliament.—These include the powers enjoyed by the two Houses for the protection and discipline of their own members, for the punishment of contempts of their authority committed by outsiders, and for the regulation of their business.[1] Two rules of capital importance are derived from this source; the rule requiring that money bills shall originate in the House of Commons;[2] and the rule prohibiting the introduction in that House of any motion involving a charge on the revenue, otherwise than on the recommendation of the Crown by the mouth of a Minister.

(2) The "Conventions of the Constitution."—These are the usages or understandings of our current political life which, though their breach would not constitute the direct infringement of any rule of law or of the "Privileges of Parliament," in fact govern the exercise of some of the most important powers of the Crown.

[1] The question whether the privileges of Parliament are derived from the Common Law, or have an independent source, was formerly a matter of controversy, since the former view involved the recognition of the authority of the House of Lords, sitting as the Supreme Court of Appeal, to adjudicate on the privileges of the House of Commons.

[2] This rule seems to be implied in the Parliament Act, and thus to have acquired Statutory authority.

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The fundamental convention, from which practically all others follow, is the convention of "Cabinet government," that is to say the rule that, with one or two possible exceptions, all the powers of the Crown or the executive part of the Government, shall be exercised, and the business of Parliament directed, by a Committee of Privy Councillors holding high office, who enjoy the confidence and support of Parliament—that is to say, in the last resort, of the House of Commons—that is to say, in the still further last resort, of a majority of the parliamentary electors. This leading convention is worked out in several others; as, for example, that some minister—either a member of the Cabinet or some minister subordinate to the Cabinet and sharing its responsibility to Parliament—is answerable for every public act of the King; that the royal assent will not be refused to any bill which has duly passed both Houses; that a Ministry which can no longer command the support of the House of Commons will either procure the dissolution of Parliament, or else resign.

(3) Principles relating to the liberty of the subject.—It is impossible, in considering the material of which our Constitution is made, to omit mention of certain maxims or principles of free government, as we understand it, which are concerned, not primarily with the framework of the State, nor with the manner in which the higher business of the Crown is conducted, but with the purposes for which, and the manner in which, it is conceived to be right—or shall we say righteous?—for government, whether executive officers or even Parliament, to interfere with the rights and liberties of private individuals. "No taxation without representation," "free speech," "freedom of conscience," "the liberty of unlicensed printing," "trial by jury"—these are great words which have moved feeling in the past, and

still have that power. When they are invoked, the Constitution is appealed to—or what is felt to be the Constitution: and what is widely and deeply felt to be the Constitution is not far removed from being so.

§ 12

Now what is quarried out of these different materials to make what we generally understand to be the Constitution?

Let us first clear out of the way whatever appears to be settled for us by the mere current usage of words: and in doing so let us admit that if any reader disagrees we bow to his dissent.

We should say, then, that in common understanding the Constitution includes every definite rule of the law, common law or statute, which goes to the organisation of the central national government and defines the powers of its different organs. Not only the Act of Settlement and the Parliament Act, but the Representation of the People Acts, the Judicature Acts, and the various Acts creating ministries, such as the Ministry of Health Act and the Ministry of Transport Act, are in this sense constitutional.

On the other hand, it is not usual to regard laws regulating local government as constitutional matter.

We must, however, probably recognise that even in the case of laws regulating the organisation of the national government there are degrees of intimacy with the Constitution. To create or to abolish a Ministry is to make a formal, but in general not a substantial change, in the Constitution. But a revival of the proposal to strip the Lord Chancellor of his Ministerial functions and to establish a Ministry of Justice would certainly be regarded as a substantial, and by many almost a fundamental constitutional change.

The autonomous powers of the two Houses of Parliament are indisputably constitutional; and so, it may be thought, are the main principles of the procedure followed by them. A change in the rules governing the conduct of business in the House of Commons which in a conspicuous degree further reduced the opportunities of criticising government measures, would certainly be regarded as a menace to the Constitution. Here, again, we must recognise degrees of constitutionality. Rules and arrangements are constitutional in the degree to which they are important. The test of verbal usage is breaking down.

This test breaks down altogether, or is displaced by the more weighty test of deep-seated public sentiment, when we come to the "Conventions of the Constitution." The examples we have given on a previous page are examples of conventions which indisputably belong, at the present day, to "our ever-changing Constitution." They have that character by reason of the nature, extent, and strength of the national sentiment by which they are supported. Practices, however ancient and familiar, which do not rest upon an equally profound public sentiment, may be regarded as not having that character. Parliament, for example, is invariably opened with a "speech from the Throne," setting forth in outline the Ministerial policy. The omission of this formality would not be unconstitutional, unless it could be shown to be in some way significant of sinister designs.

§ 13

The late Professor Dicey has made two observations upon the "Conventions of the Constitution"—the term is his own—which call for our attention.

He says in the first place that these conventions "will

be found, . . . on careful examination, to possess one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised. . . . (They are) in the main, precepts for determining the mode and spirit in which the prerogative is to be exercised, or (what is really the same thing) for fixing the manner in which any transaction which can legally be done in virtue of the Royal Prerogative . . . ought to be carried out."

§ 14

Professor Dicey's second observation is to the effect that the singular authority possessed by these conventions, rests not so much on that vague and vacillating thing, public opinion, as upon the more solid fact that a breach of any one of these capital understandings would very shortly bring the offending administration face to face with the choice between committing a definite breach of the law, and being unable to carry on the government. If, for example, Ministers were to omit, in any year, to cause Parliament to be summoned, they would be unable legally to collect a substantial proportion of the taxes; and such part of the revenue as came in would not, without a breach of the law, be available for their use.

While we may certainly agree that Ministers of the Crown could not for long liberate themselves from dependence upon the representatives of the people in Parliament, without breaking the law—many of our laws were, in fact, designed with this very object—nevertheless, there seems to be a certain unreality in minimising the immediate and compelling authority of

opinion. Cabinets are not composed of the kind of men who would seriously contemplate defying the House of Commons and the electorate; they desire above all things to retain the allegiance and to promote the fortunes of their party; they desire to be re-elected; and they do not desire either a revolution or political extinction.

§ 15

The Constitution contains, we have suggested, yet a third species of matter, besides positive law and the Conventions, namely what we have called the principles of liberty. These principles are perhaps vague: but it seems impossible to dispute the reality of the influence they exercise.[1] Like the Conventions, they rest on opinion; but unlike the Conventions, they extend to the control not only of the discretionary powers which the law leaves in the hands of the executive, but to the substance of the law itself. The sense of the importance for liberty of an independent judiciary inspires current criticism of legislation which places powers of adjudication in administrative matters in the hands of Ministers. Preoccupation with the liberty of the subject inspires the public interest in the laws relating to the powers of the police. It would be difficult, if not impossible, for an English government to procure the adoption of a law establishing a press censorship, or abolishing trial

[1] The reader may remember, in R. L. Stevenson's *Footnote to History*, the account of the suppression of the Samoan newspaper by the German Administrator. "To Fritze, the step seemed natural and obvious; for Anglo-Saxons, it was a hand laid upon the altar; and the month was scarce out before the voice of Senator Frye announced to his colleagues that free speech had been suppressed in Samoa."

by jury for serious offences. The susceptibility of public sentiment in England on the point of freedom of conscience was illustrated in what, if we consider other civilised countries, must be regarded as a remarkable manner, by the consideration shown during the War to conscientious objectors.

§ 16

It is obviously difficult to draw a clear line of distinction between that kind of public sentiment which may properly be described as "constitutional conscience,' and political feeling of a less specific character. The distinction is, nevertheless, real. The constitutional conscience is concerned with the rules of the game, with fair play, with a due respect for the rights of minorities and individuals, with regard not only for law, but for the spirit of law. This sentiment would rarely be aroused by a measure, however obnoxious to a party, which was being carried with the support of an indisputable majority of the electorate, and with due observance of the law and customs of parliamentary government. The abolition, for example, of the hereditary character of the House of Lords, carried through by means of the Parliament Act, would doubtless be resisted on constitutional grounds, that is to say, on the ground that it made an undesirable and even, to many, an alarming change in the Constitution. But it would not be contended that such a measure, carried through in the way we have supposed, was unconstitutional in the profounder sense of being an offence against the fundamental rules of political fairness, a betrayal of free government, or an outrage on liberty. To any such grand indictment it would be difficult, in the present state of our institutions, for an English Cabinet to

expose itself. Too much of the support on which any government must rely is dispassionate and critical in temper; the balance of power and the balance of judgment are too nearly identified.

The field for the vigilance of the constitutional conscience lies in our time rather in resistance to the more insidious attacks on liberty, which wear the guise of movements of efficiency, directed to objects which are generally approved.

CHAPTER II

THE SPIRIT OF LAW

"La ley est la plus haute inheritance que le roi ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi et nul inheritance sera."—*Year Book of* 19 *Henry VI.*

§ 1

THE moving spirit of the Constitution is to be found, then, in a certain characteristic of the English mind, which can best be described as attachment to law, as the sense that in the law, and in law—they are not quite the same thing—there resides an authority superior to any other power in the State. In the words of Bacon, "The people of this Kingdom love the laws thereof, and nothing will oblige them more than an assurance of enjoying them; what the nobles once said upon occasion in Parliament, *nolumus leges Angliæ mutari*, is imprinted in the hearts of all the people."[1] This characteristic is as important, and as hard to define, as the Constitution

[1] The following passage from the Austrian legal philosopher, Ihering, is worth quoting: "In the guinea for which the litigious Englishman fights so stubbornly at law lies the explanation of England's constitutional history. No one, however mighty, will dare to rob of its dearest possession, liberty, a people in whose ingrained character it lies to battle boldly for its rights even in the smallest things; and it is no accidental coincidence that, in antiquity also, the people which combined the highest degree of political development with the greatest external power, the Roman people, was also that one which possessed the most elaborate system of private law."

to which it has given birth. While it can be recognised as active in the earliest stages of our history, it has both grown in vigour and developed in character in the course of centuries. In the age of Magna Charta, while it is agreed that the King is bound by the laws of religion and morality, the definite law of England which he ought to respect is chiefly thought of as protecting private rights, liberties, and franchises.

In the next age, with the growth of Parliament, there comes into men's minds an increasingly clear conception of law as governing the way in which the laws themselves may be made. As Fortescue, who was Chief Justice under Henry VI, said in his famous book, *De Laudibus Legum Angliæ*, "A King of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political."

The Tudors, with all their love of power and aptitude for sovereignty, were careful at any rate of the forms of law, fostered Parliament, of which they made skilful use, and resorted readily, sometimes with gusto, to litigation in the courts of Common Law.[1]

[1] "Henry VIII, when he wished to throw off the authority of the Pope, thinking that as long as the name of St. Thomas should remain in the calendar, men would be stimulated by his example to brave the ecclesiastical authority of the sovereign, instructed his Attorney-General to file a *quo warranto* information against him for usurping the office of a Saint, and he was formally cited to appear in Court to answer the charge. Judgment of *ouster* would have passed against him by default, had not the King, to show his impartiality and great regard for the administration of justice, assigned him counsel at the public expense. The cause being called, and the Attorney-General and the Advocate for the accused being fully heard, with such proofs as were offered on both sides, sentence was pronounced, that 'Thomas, (sometime Archbishop of Canterbury), had been guilty of contumacy, treason, and rebellion, etc.'"—Campbell, *Lives of the Chancellors*, I, 97.

Nevertheless, if the beneficent autocracy of the Tudors left the formal institutions of the Common Law unimpaired, it brought their real authority into serious peril; and, as we all know, the change of dynasty was the signal for a conflict in which the principal issue was between the Common Law and the royal prerogative. The long constitutional battle of the seventeenth century was, in substance, waged between the doctrine that the Crown had retained its primitive character as a spring of spontaneous and self-determining, but legitimate, authority; and the opposing doctrine of the Common Lawyers that the supreme rule in the State is in the law as made and expounded in the King's most ancient courts, of which Parliament is the highest. In the words of Sir William Holdsworth, "It was the victory of the Parliament which ultimately gave back to the Common Law that supremacy which had nearly disappeared in the sixteenth century." It was towards the end of the conflict, when final victory was at hand, that the word "Constitution," in its modern sense, a word for which men had so long been groping, seems to have made its way into the language.[1] We may agree with an American historian that a great step forward was made when our ancestors came into possession of a word which fully expressed the idea that law rules the State, and that outside the fundamental institutions recognised and regulated

[1] The earliest use of the word on a great occasion appears to be in the famous resolution of the House of Commons on 28th January 1688-9, that King James II, "having endeavoured to subvert the Constitution of this Kingdom, by breaking the original contract between King and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the Kingdom, has abdicated the government, and that the throne is thereby vacant."—Hallam, III, 93.

by the law of the land there was no legitimate authority.[1]

§ 2

In the eighteenth century, although, as we can now clearly see in retrospect, the Constitution was, in fact, in a state of continuous evolution, developing the practice and the conventions of Cabinet and party government, and leading on to the supremacy of popular opinion expressed by the House of Commons, it was regarded both at home and abroad as having for its chief characteristic the protection it afforded to liberty.[2] This was what impressed Montesquieu. "Il y a aussi une nation dans le monde qui a pour objet direct de sa constitution la liberté politique." It is the principal burden of Blackstone's account of the Constitution. Political power was a dangerous animal, whose presence in the house of

[1] "What we now know as the Constitution could not exist without the consciousness in the minds of all classes of English citizens that they were the subjects of such an embodiment of the nation's will and the nation's authority."—Macey, *The English Constitution*, 453. In the opinion of this writer "the English were not yet—in 1688—generally conscious of the possession of a great and glorious Constitution. The term had not yet become a word to conjure with."—*Ibid.* But by the time of the impeachment of Dr. Sacheverell (1710) the term had obviously come into common use. It is used not only in the articles of accusation, but again and again in the speeches of the Commons managers.

[2] Even after the Revolution we find the Constitution sometimes regarded as a sort of "enclave" in the framework of State. In 1701 a bill was introduced in the House of Commons "for abjuring the Prince of Wales." "The clause of maintaining the government in King, Lords, and Commons, was rejected with great indignation; since the government was only in the King: the Lords and Commons being indeed a part of the Constitution, and of the legislative body, but not of the government. This was a barefaced republican notion."—Burnet, *History of His Own Time*, IV, 552.

State was an unavoidable necessity, but which a "just balance of the Constitution" served to control.[1] It was in this light that the English Constitution appeared to the Americans. The Constitution, the main features of which, fortified by additional securities, they sought to reproduce, was a thing of "checks and balances," chiefly designed to protect the citizen against the inconveniences and dangers of having any government at all.

In our own day the spirit of law has largely outlived these preoccupations. As the nineteenth century drew on, arbitrary methods of rule passed out of fashion even in countries which made no profession of popular government. If we can imagine a German coming to the study of the English Constitution as a novelty, say, in the year 1880, what he would chiefly have noticed would have been not so much the securities which it offered for private rights—though he may well have thought that those rights were still more effectively protected in England than in Germany—as the fact that it contemplated and secured that all parts of political power should be exercised in compliance with the dictates of a vigilant and active public opinion. He would have observed that in the conception of popular liberties the emphasis was no longer, as it had been in the eighteenth century, on the protection of private rights, but on the power to dominate policy. It need hardly be said that this does not mean that, in the last

1 "The Revolution was a triumph of the lawyers over the executive, the close of a long struggle begun by Coke and Selden to subject the legality of the King's actions to the free judgment of the Courts that administered the Common Law. The victory of law over insuperable and arbitrary power was a splendid triumph for civilisation, but it made the lawyers' point of view somewhat too predominant . . . and whatever is, is right—if it can show a charter—seems the watchword of the eighteenth century."—Trevelyan, *History of England*, 506.

chapter of the story, the national instinct for law has completed its task. It is still upon this profound national sentiment that we depend for our security that popular government shall continue to be "consultative government."[1] It is upon the continued power of this instinct that we must rely also for two connected effects. The habit of political compromise—the preference of half-way measures, which secure a maximum of consent, to complete victories carried on a bare margin; and the converse habit of treating the upshot of a political fight as a settled matter. And it is upon the spirit of law that we must depend, now that we have created an actively administrative State, vigorously pursuing a great variety of purposes, to keep in check the natural drift of policy to escape from the tutelage of debated legislation and public adjudication.

§ 3

The legal bent of the English political mind may doubtless be traced to the convergent effect of many causes. Of these, three deserve particular mention.

The first is the fact, which we have already noticed, that reverence for law was an important part of the original endowment of moral ideas which, in the Middle Ages, England shared with other Western countries. It was something to be preserved and strengthened, not a novel lesson which had to be learned.

Nothing did more to fortify this original characteristic than the long schooling which all classes of

[1] "I believe, more than ever, that it is by means of its old and tried system of consultative government that this country, this Empire, will go on in the future to greater triumphs than it has seen in the past."—Mr. Speaker Whitley's Farewell Speech to the House of Commons, *The Times*, 26th June 1928.

Englishmen, except perhaps the humblest, received from an early age of our history, in the administration of local government. In France it was not till the spirit of the Middle Ages was dead that the King was strong enough to govern otherwise than through feudal lords. The English Crown waged a more equal battle with feudalism, and was able much earlier to free itself from —in fact it was never wholly captured by—a system of government resting upon the hereditary prerogatives of great landlords. It substituted a dual system. On the one hand, the King sent out from his Court the itinerant justices, who, save for their greater powers and authority, may, in respect of their control of administration, be remotely compared to modern inspectors from Whitehall. On the other hand, there were brought into action the local men, sheriffs, coroners, justices of the peace, and a growing host of jurymen, who, without ceasing to belong to and to permeate the political class throughout the country, lived in an atmosphere of legalities, and learned to govern by law and by legal forms of procedure. And it was largely in the machinery of the law, through the judges on circuit, or by writs returnable at Westminster, that the Crown found the most convenient means of keeping those necessarily somewhat independent servants—often serving under compulsion, often unpaid—up to and within the collar of their official duty. The institutions of local government were forged into a great national school of legal administration. It would be difficult to exaggerate the importance which the habit and tradition of jury service, on the one hand, or, on the other hand, for a higher and narrower class,[1] of service on the Commission of the

[1] The institution of Justices of the Peace "knits noblemen and gentlemen together, and in no place else but here in England are noblemen and gentlemen incorporated; for abroad in other

Peace, have had in familiarising the people of England with the responsibilities of administration, with the atmosphere of courts of law, and with the idea that the natural method of government is by presentment, trial, and judgment. It was at quarter sessions that the members of the Long Parliament learned the lessons which enabled them to set up a new government.

It is not irrelevant to remind the reader at this point of the importance for the development of English political institutions of the fact that the nobility was not able, or was not permitted, as it was in France, to establish itself as a legally distinct and privileged class. "The law has never taken notice of gentlemen." This was partly due to the early establishment of the rule of primogeniture, which created, of course, a marked difference between the position of the eldest and the younger brothers. It was also due to the power and policy of the Crown. The effect was far reaching, both in providing social strength for local and popular, not to speak of parliamentary, institutions, and in fortifying the national attachment to a Common Law which was no respecter of persons. If there had arisen in this country a class of *noblesse* able to claim for all its members privileges and fiscal immunities denied to other freemen, and in particular to the burgesses of the boroughs, it is difficult to imagine that the House of Commons would ever have come into existence as an assembly representative of all classes, or consequently that Parliamentary government would ever have been established in England.

countries noblemen meddle not with any parcel of justice, but in martial affairs; matter of justice that belongs to the gownmen; and this is it that makes those noblemen the more ignorant and the more oppressors; but here amongst us they are incorporated with those that execute justice, and so being warriors are likewise made instruments for peace; and that makes them truly noble."—Bacon.

§ 4

Then, thirdly, we must notice the share taken in the moulding of the political mind of England by the legal profession. This is one of those phenomena the very familiarity of which is apt to conceal it from our sight. It is only when we seek in vain, in other countries, for an analogy to the English Bar, that we perceive how unique it is as an institution, and how deep and enduring has been the mark which it has laid upon our constitutional history.[1] By the Bar we mean, for the present purpose, the whole of that remarkable society which includes in a common fraternity both judges and advocates, and has retained, almost unchanged for seven centuries, its primitive organisation in self-governing guilds. Centralised in the capital, living on terms of intimacy with Parliament and with the King's Court, the strength of the Bar as a social and political force was fortified by the close, daily, and lifelong association of its members in court, in lecture-room, in hall, and in chapel, by common learning and by common professional interests, and, until recent times, by the smallness of its numbers and the aristocratic character of its connections.

This society lived under the shadow of the royal court, and, being intimately associated with the conduct of the King's business and with the furtherance of his interests, derived corresponding prestige from the royal favour. In course of time, its leading men defeated the churchmen in the competition for the great offices of

[1] "What is distinctive of mediæval England is not Parliament, for we may everywhere see assemblies of estates, nor trial by jury, for this was but slowly suppressed in France. But the Inns of Court, and Year Books that were read therein, we shall hardly find their like elsewhere."—Maitland, *English Law and Renaissance*, 28.

State, and came to furnish no small proportion of the noble families of the Kingdom. It would be a mistake to think of the English bench, or of the professional society to which it belonged, as having been, before modern times, a completely independent and impartial arbiter between the Crown and the subject. The King, it is true, was always conceived of as bound by the laws; and the application of the laws was entrusted to the King's judges. But in the central period of our history, when the building was rising above the foundations, the inevitable necessity, so obvious to us, of judicial, as distinguished from parliamentary and political conflict between the claims of the prerogative and the rights of the subject was not conspicuous. One may conjecture that speculation on such a theme would have seemed to our legal ancestors to savour of the indiscreet. Tocqueville has remarked that if the English judges had not been conscious that they were before everything the King's servants, if acute conflict had sprung up between the Crown and the Bench before the time was ripe, the authority of the judges would have been set aside and limited, and the tender growth of government by law would not have come to maturity. The French *parlements* (which, of course, were not parliaments, but courts) committed just this mistake of working their way, by the steps of proprietary and indefeasible office, to a premature independence. With us the notion that it was the duty of the judges to set bounds to the prerogative, was of slow growth, and did not become vigorous until Parliament had attained sufficient power to offer the judges an alternative allegiance. The constitutional victories of the seventeenth century were largely due, it is true, to the alliance of Parliament with the common lawyers; but it was not till after the Act of Settlement had placed the judges

under the protection of Parliament that judicial decisions unfavourable to the Crown ceased to be exceptional.

It has been of importance in the history of the Constitution that the Bar has never lost close touch with the business of government. There has never been set up in England a body of official advocates, separate from the Bar at large, whose exclusive duty it was to conduct the litigation of the Crown.[1] The result is that while the Bar has known how to maintain "that boldness in the face of authority which has always been the chief bulwark of our constitutional liberties," it has never acquired, as it might otherwise so easily have done, to the destruction of its influence, the temper of an irresponsible opposition. This impartial position of the Bar, serving equally both the Crown and the public, corresponds to, and has done much to preserve, an important characteristic of the Common Law, that it makes no theoretical distinction between disputes between subjects and controversies with the Crown—between private and public law.

§ 5

It was from the labours and the traditions of the society thus constituted that the Common Law sprang. Unlike its only rival, the law of Rome, which was the intellectual achievement of a whole aristocracy of

[1] While, on the Continent, criminal prosecutions are exclusively conducted by the salaried members of a public department, in England a barrister may as often find himself briefed for the prosecution as for the defence. This practice works in the same sense as the jury system, and the (nowadays somewhat theoretical) reliance placed upon private prosecutions, to emphasise that the enforcement of the law is a public, as distinguished from a merely State interest.

soldiers, priests, magistrates, and men of the world, our Common Law was the work of a close co-operation of professional men, proud-spirited, zealous for public service, and independent, but perhaps somewhat imperfectly susceptible to external influences. Of this origin our law has always borne strong marks, in its technicality, in its indifference to system, and in its emphasis on procedure.

But the very formalities, conservatism, and trades-unionism of the Common Law proved to be qualities which fitted it in an eminent degree to be the rallying ground for the defence of our political liberties. And the common lawyers showed a great, if sometimes perhaps half-conscious, political skill in the way in which they carried the ark of the covenant past successive perils. Of these the greatest was the rivalry of the Roman Law, pressing in on the tide of the Renaissance. The legal tradition which was preserved in Westminster Hall was moved by reasoning which appealed to contract, ancient and settled custom, vested right. A time came when, on the Continent of Europe, other ideals and new forces put traditional legalities on one side, and notions of policy and authority, inspired by new conceptions of national monarchy, cast law and liberty alike into the shade. Against these powerful influences, which attracted many active minds in England, the English common lawyers, inspired no doubt to some extent by professional animus against the rival learning of the civilians, offered a vigorous and successful resistance. The whole corpus of Roman Law was represented as being summed up in the shocking maxim "quod principi placuit legis habet vigorem"—the King's will is law—and the ancient precedents of our insular system were fortunately preserved from foreign attack, to be handed down, idealised,

misunderstood, and perhaps sometimes misrepresented, for the inspiration of Hampden, Vane, and Somers. The Court of Star Chamber, the abolition of which was one of the first acts of the Long Parliament, had been well advanced in its task of establishing, as a permanent feature of our government, a species of prætorian Crown law, which, had it been successful, would have put all officials acting on behalf of the Crown beyond the reach of the Common Law. We should have had a system of "administrative law," overriding and excluding, in matters affecting the interests of government, the ordinary law of the land. This error might, perhaps, in the long run, have afterwards been corrected, as a result of purely political forces. But meanwhile, we should have lost the guidance of what was, for long, our leading constitutional idea—the equal subordination of government and citizen to the same law.[1]

§ 6

Nowhere is the influence of the Temple and of Westminster Hall[2] more marked than in the habits and

[1] The singular authority attributed by English tradition to the judges is the subject of frequent comment on the Continent. Foreign writers on Constitutional Law see this authority carried to its highest expression in the power exercised by the American Courts (and, *mutatis mutandis*, by the Courts of the Dominions) to refuse to give effect to a law which conflicts with the Constitution. "Pour attribuer aux tribunaux un rôle si délicat et si important, il faut avant tout que la magistrature possède une bien haute autorité; il faut que le peuple ait une confiance profonde dans sa sagesse et dans sa valeur professionnelle et scientifique. Cette autorité, la magistrature anglaise, l'a gagnée et conservée dans l'esprit des Anglo-Saxons. . . ."—Esmein, *Droit Constitutionnel*, I, 636.

[2] A younger generation needs perhaps to be reminded that in

forms of Parliament. In former times lawyers had great influence—greater than they have to-day—in both Houses of Parliament. This was not so much because they were ready speakers—lawyers have seldom been found in the first rank of persuasive parliamentary orators—as because they knew the law, because they could draft—a most valuable accomplishment in opposition, or even in office before the days of a Civil Service—and because they had a trained instinct for stable procedure.[1] It is to the lawyers that the House of Commons owes the impulse to the creation of the remarkable code of procedure on which it has rested its self-discipline, and its resulting authority. To the same influence we may trace the slow evolution of the Speakership into a strictly judicial magistracy. To the model furnished by the Courts of Law we may also attribute the habit, so peculiar to England and the English-speaking world, of conducting public business, wherever possible, after the manner of a jury trial, in Committees on private bills, in Royal Commissions, and in public inquiries of all sorts. To quote a recent example, the Savidge inquiry was conducted as though it were an action between the police and the lady whose

the language of a passing age "Westminster Hall" means the Law Courts. The present writer remembers being taken as a boy to see the Courts of Common Law sitting in Court-rooms, now of course demolished, which abutted on the outer walls of Westminster Hall and opened into the hall. This convenient proximity to the House of Commons made it possible for the Speaker, when it was necessary to "make a House," to send the Sergeant-at-Arms round the Courts to collect a sufficient number of "gentlemen of the long robe" who were members of Parliament.

[1] Hallam remarks that the temper of Cromwell's Army was more revolutionary than that of Parliament, because it was "not checked, like the two Houses, by attachment to forms, and by the influence of lawyers."

experiences had excited public concern.[1] This method of investigating questions of public interest, powerfully effective as in many respects it is, sometimes seems to lead to the non-production of evidence of the effect of which on their rival contentions neither of the disputants is confident.

§ 7

It is to the influence of legal models that we must look for the explanation of the authority of precedent in constitutional matters. The habit of looking to precedent for guidance appears so natural to us that it may hardly seem to stand in need of comment. But we have only to look abroad to learn that this is by no means the case. The rule of precedent can only be established by bodies such as the English Bench and Bar, or its pupil, Parliament, which possess both unity and authority, and are both able and anxious to cherish the records of their past acts, in a way in which larger, looser, and less specialised communities might not do.[2] The respect for precedent was taught by the lawyers to Parliament and to the political world; and the lesson was

[1] *The Times* of 3rd March 1929 contains a report of proceedings before a Board of Trade Committee appointed to inquire into an application for the imposition of a safeguarding duty on woollen and worsted textile goods. The arguments for the applicants and for the opponents were conducted by two King's Counsel, who examined and cross-examined witnesses as though the committee had been a Court of Law.

[2] The centralisation of French justice in Paris, which was one of the achievements of the Revolution, was not long in creating for judicial precedent an authority which it had never before possessed; and conversely there appear to be signs that the decentralisation of justice in America, and the multiplicity of Bars and jurisdictions, is tending to weaken the power of precedent as a source of law.

of momentous value. In the first place, the precedent of an old solution of a difficulty, debated and settled without reference to the present controversy, renders to to-day's disputants something of the service of an impartial arbitrator. Then, again, the authority of precedent is elastic—it is persuasive rather than peremptory. If its persuasive power proves insufficient, if it departs too widely from what men are now ready to accept, it can be "distinguished" without impiety, and without shaking the prestige of law—attributes very proper to the guidance of consultative government. Finally, precedent has the psychological merit that it conceals change under the cloak of development, and invests the new departure with some of the weight of old custom. Had it not been for the traditional respect for precedent which English Parliamentarians learned from the law, the history and spirit of the Constitution would be very different from what they have been and are.[1]

§ 8

Before leaving the subject of the influence which the spirit of legality has exercised in the formation of our Constitution, it seems necessary to add that we are not entitled to think of ourselves as a nation which has been invariably meticulous in law-observance. The Statute Book, at any rate before the Statute Law Revision Committee had purified its pages, was full of laws which had fallen into desuetude. This is particularly exemplified in the case of laws relating to Parliament. Repeated

[1] Hallam, in his pleasing language, speaks of "that centripetal force, that moral attraction towards uniformity and obedience to custom, which Providence has rendered one of the great preservatives of political society."—*C. H. E.*, II, 55.

mediæval enactments directing that Parliaments must be summoned annually were systematically ignored. An act of Henry V requiring that knights and burghers should be residents in their constituencies, though not repealed till 1774, was habitually disregarded from the time of Elizabeth. Lawyers were excluded from the House of Commons by an act of Edward III which, quickly falling into a long oblivion, was rescued therefrom only to be repealed in 1871. The high property qualification for Members enforced in 1710 was systematically evaded. The rule of the Common Law, confirmed by Statute, which declared minors to be ineligible for the House of Commons, was frequently and conspicuously broken. And so forth: other examples of all kinds, both ancient and modern, could be given. The present attitude of the public towards the legal regulation of motor traffic is in point.

How is this phenomenon to be reconciled with the claim that legalism is a predominant trait in the national character? The answer appears to be that it is not abstract law as such, which has commanded allegiance in England, but law regarded as the expression of reason and common consent. Laws which are neither congenial to popular views of policy, nor designed to create or protect private rights, have often been overruled by the jurisdiction of the man in the street, a jurisdiction which is only another expression of the national aptitude for self-regulation. You cannot, it seems, have a confirmed national habit of continually creating law by custom and convention, without having at the same time the converse habit of correcting by neglect the less successful experiments of the legislature.

CHAPTER III

THE CLASSICAL PLAN

§ 1

IN one sense we may say that we have never had a plan of government. No King, no body of authoritative and representative Englishmen, has ever promulgated in a single law the considered principles of the English constitution.[1] Had that happened once, it would have had to happen again and again, with a revolution each time. At whatever moment one chooses to say that our constitutional history began, at the Conquest, with the granting of Magna Charta, with the meeting of Simon de Montfort's Parliament, we find a certain set of ideas prevailing as to the right and lawful way for the government to be conducted. A new balance of political and social forces, new needs and new problems, bring about a change in these ideas; the process never ceases; often it works silently and peacefully, by the slow building up of habits; sometimes it is expressed in very definite acts—statutes, declarations, or treaties—which make conspicuous landmarks in history, and have generally been the result of political conflict. Magna Charta, which stands at the head of our Statute Book, is very far from laying down a fundamental scheme of government; and, though it deals with

[1] Except only the case of Cromwell's "Instrument of Government," which has no place in the continuous history of the Constitution.

a greater variety of subjects than any other Act of our constitutional history, it professes rather to confirm than to change the existing law. In fact, it was on the charter granted by Henry I at his coronation, more than a century before the famous assembly at Runnymede, that the barons, on the advice of Stephen Langton, based their demands.

The hesitation of the historians in fixing a date for the first meeting of Parliament is due, not so much to the silence of the records, as to the fact that Parliament, originating as a development, inspired by political tactics, of more ancient councils, crystallised only gradually, passing through the stage of a recognised political habit, and thereafter by degrees becoming an institution of the law, possessing privileges and powers of capital importance.

The King undoubtedly possessed at Common Law, and exercised for centuries, the prerogative of legislating by proclamation or ordinance. It is impossible to fix on any definite moment for the disappearance of this power. The most we can say is that it was discredited by the advisory opinion of the judges in 1610, that it was crippled during the Rebellion, and did not survive the Revolution.

Catastrophic changes were made in the Constitution by the Long Parliament; but they were undone, and so far as possible all memory of them was obliterated at the Restoration. Apart from the immense effect which the Rebellion had in bringing the nation to political maturity, its net result, when all was over, was confined to a limited number of definite reforms, lying in the natural line of development, and carrying a long step forward the age-long process by which the supremacy of Parliament was established over legislation and taxation.

And so it has gone on from generation to generation. The Bill of Rights, the Act of Settlement, the Reform Bill, the Parliament Act, have translated vehement political tension into the terms of legal amendments which, when the temperature has subsided, have come to seem moderate and cautious. On the only occasion when a conflict has been carried through to the uttermost victory of an extreme party the movement ended in the complete discredit of that party, and in violent reaction; and the nation has learned from this, as well as from many other less tragic experiences, the capital political truth that, while the secret of stable government lies in perpetual reform effected with the maximum of consent, it is for propositions of abstract principle that wide consent is secured least readily, and for limited practical projects that it is obtained most readily. In every case the change, the step forward, has been by way of the partial amendment of a "going concern." There is a certain truth behind the evident exaggeration of the saying that the Constitution which Queen Victoria swore to preserve was the constitution of William the Conqueror.

§ 2

Our business is with the going concern of the present day. But, as we already know, that going concern is largely governed by political habits and conventions which are not law. And for the proper understanding of what these habits and conventions are, and where their force comes from, it is well to go back to a time when the most important of them were as yet unknown. If we go back to the beginning of the eighteenth century, say, to the passing of the Act of Settlement (1701) or the accession of Queen Anne (1702), we find

England governed by a Constitution in which the current practice and the ideas entertained as to what is constitutionally proper do not differ widely from what is laid down in the law books.[1]

Let us see what the principal provisions of this Constitution were. In the first place, England is a hereditary monarchy. The order of succession to the throne is determined by the Act of Settlement. The Sovereign exercises all the powers of government which are not reserved to Parliament or to the judges. These powers may be, and frequently are, exercised by the Sovereign personally, provided that in the case of acts for which the law requires formalities such as the affixing of the Great Seal, the concurrence of the Chancellor or the Lord Keeper, of the Lord Privy Seal, or other high officers of State, may be necessary. Though the Sovereign commonly and regularly consults selected Privy Councillors, and presides over their meetings, he

[1] Blackstone puts the moment at which the Constitution attained practical perfection as the year 1679. "The point of time at which I would choose to fix the *theoretical* perfection of our public law is in the year 1679; after the *Habeas Corpus* Act was passed, and that for licensing the Press had expired; though the years which immediately followed it were times of great *practical* oppression." Charles James Fox, in the Introduction to his *History of James II*, quotes this judgment with approval: "Here we are, then, at the best moment of the best Constitution that human wisdom ever framed." To both these writers the vices of a government which was both bad and unpopular were to be attributed to the defects of human nature, and in no degree to the imperfections of a Constitution which gave commanding influence to kings who disagreed with their subjects on the question the latter cared most about—the Protestant religion. The choice of 1701 or 1702 as a date for examination of the purely legal constitution is somewhat arbitrary. It is to be remembered that by this time parties had a recognisable existence, and that William III had already found it convenient to combine Ministries of the same political colour. But party government as a recognised principle was still far off.

is not bound to invite, still less to take, anybody's advice. It is not yet understood, or settled, that for every act of the Crown some Minister must be responsible. But councillors who have, in fact, given effective counsel which is displeasing to Parliament may be impeached, and, if their offence is an executive act, they cannot (so it seems, since Danby's case[1]) plead in defence that they had merely complied with the King's commands.

Laws are made by the King in Parliament, and by this means only. The King cannot change the law by proclamation or other act of the prerogative; neither can he suspend the operation of a Statute, or grant to any person a dispensation from its effects. But he can refuse his consent to a bill which has passed both Houses of Parliament.

Taxation can be imposed only by Act of Parliament, and money bills must originate in the House of Commons, on the initiative of the Crown. Such bills cannot be amended, but can—though this is perhaps doubtful—be rejected by the House of Lords. Money voted by Parliament, except the sums voted for the "support of the royal household and of the honour and dignity of the Crown," is strictly appropriated to the objects for which it is granted.

There must be a new Parliament, which means a newly elected House of Commons, at intervals of not more than three years.

[1] Lord Danby was impeached in 1679 for having written to the English Minister in France offering England's neutrality in the war for which Parliament had just voted supplies. This letter bore an endorsement, signed by Charles II, saying, "This letter is writ by my order." Although Danby was never sentenced, the fact that the impeachment was proceeded with after this endorsement came to light has been taken as settling the principle stated.

It is illegal for the Crown to maintain a standing army in time of peace without parliamentary authority.

The laws can only be enforced by judicial proceedings, and are equally enforcible against every subject. No one can plead the orders of an official superior as an excuse for an illegal act. Though the judges still hold their offices "during pleasure," and the Crown can legally remove them without cause shown, this is recognised as a defect in the Constitution, and will be remedied so soon as the Act of Settlement (which is already on the Statute Book) comes into operation.

§ 3

We find, then, at the beginning of the eighteenth century, a state of public law in which political power, the power of government, is split up among three principal authorities, of which one is subdivided into three parts, and one, for some purposes, into two parts; and all of these parts enjoy a considerable measure of independence one of another. We have the King in his executive capacity, the King-in-Parliament, and the judges. The King in his executive capacity is in some things able to act as an individual: he can correspond with foreign princes, appoint and dismiss his ministers, refuse, if he wishes, to spend money voted and appropriated for public purposes.[1] For some purposes the King is obliged by law, for most others he is compelled by tradition and the pressure of business, to act through or with one or more Privy Councillors. The King-in-Parliament is a tripartite authority,

[1] Compare the recent decision of President Hoover to postpone the spending of money voted for Congress for naval construction.

composed of the Sovereign, the House of Lords, and the House of Commons, each independent of the other two, each capable of obstructing any proposed law or tax by withholding its necessary consent. Ministers have no very clearly defined place in the scheme; sometimes they appear to be little more than whipping boys.[1]

The Constitution was perhaps as near to creating a state of balanced impotence at the beginning of the eighteenth century as at any other time. Even at that time the ceaseless pressure of political realities was urging it on to new adjustments, which were destined in the long run to evolve into a quite definite system of a very different kind; but the process took a long time—roughly speaking, the whole eighteenth century. And while the process was going on, it was so little understood by contemporaries, that it appeared to be little else than a regrettable corruption of a theoretically perfect system. For, with all its defects, real and imaginary, the English system of government, as it existed in the age following the "glorious Revolution," appeared both to Englishmen and to foreigners to be a remarkably successful arrangement for reconciling government with liberty. Before the Americans made their

[1] Hallam finds the first reference to the principle of Ministerial responsibility in 1711. In a debate on 12th January of that year, the Earl of Rochester said, "For several years they had been told that the Queen was to answer for everything; but he hoped that time was over; that according to the fundamental Constitution of this Kingdom the Ministers are accountable for all, and therefore he hoped that nobody would—nay, nobody durst—name the Queen in this debate." But even when this principle was clearly recognised, the King was still, and long remained, at liberty to choose and to change his Ministers; so that the only restriction which it imposed on the independence of the Crown was that it restricted the Sovereign to policies which he could find some reasonably conspicuous person to acquiesce in.

own Constitution, England appeared to be the only country in the world which was ruled without tyranny.[1]

§ 4

We have already noticed the remark of Montesquieu that the direct object of the English Constitution was to secure personal liberty. In the same book, the *Esprit des Lois*, published in 1748, the author put forward, as an explanation of the, at any rate theoretical, excellence of this Constitution what is perhaps the most famous of all political theories, namely, that its merit rested upon the "separation of powers." This theory captivated mankind, dominated the minds first of the American, and then of the French makers of republican constitutions, and through them the minds of all their many disciples all over the world, and has, in every country save that from whose supposed example it was borrowed, been universally regarded as the first article in the creed of free government.

The theory was to the following effect:—the fundamental powers of government are threefold: the executive power, the legislative power, and the judicial power. To prevent misgovernment, it is necessary, and should be sufficient, that no two of these powers be entrusted to the same hands. If the power of making the laws is exercised by the same man or men as those who execute them, or as those who interpret them, the result will be tyranny—and tyranny is the capital

[1] "When Voltaire came to England—and Voltaire represented the spirit of his age—his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by caprice."—Dicey.

disease to which government is liable. Montesquieu does not give any very clear justification for this grand generalisation—which may be one explanation of its great popularity. His real reason is his belief that he has penetrated the secret of the admired Constitution of England. He does not answer the obvious question, what is to happen if two of the powers chance to have the same objects and interests and to form an alliance; and he shows no appreciation of the fact that governments have important positive duties to perform, for the discharge of which it may be essential to secure the close co-operation of all the powers of the State.[1]

§ 5

Now the point to be made is this: Montesquieu was not far wrong in his description of the English Constitution as it was fifty years before he wrote, or as it was still imagined in his own day that it would be, if it were purged of abuses. But he made two mistakes. The first was in thinking that the explanation of the merits of the Constitution was to be found in the mutual independence of Crown and Parliament—the independence of the judges was not in question; he was right on that point. His second mistake was in supposing (as he

[1] To which he would doubtless have replied that he is only commending the English for what, to a Frenchman of his day, appeared to be a rare achievement, the liberty of the subject. He recognises, in his following chapter, that "les monarchies que nous connoissons n'ont pas, comme celle dont nous venons de parler, la liberté pour leur objet direct; elles ne tendent qu'à la gloire des citoyens, de l'Etat, et du prince. Mais, de cette gloire, il résulte un esprit de liberté qui, dans ces états, peut faire d'aussi grandes choses, et peut-être contribuer autant au bonheur que la liberté même."

must have done) that save for the naughtiness of politicians the Constitution could have continued, on the basis of this separation of powers, in a state of stable and balanced motion.

The fact that the King could do little without Parliament, and that Parliament could do nothing without the King, furnished no particular security for the liberty of the subject, if by that liberty we mean anything more than not being interfered with save by due process of law. Unpopular opinions in religion or politics have nothing to hope for from the fact that Parliament and King can do nothing unless they are agreed, for they may very well agree, to the detriment of the liberties of the few and the weak—as the English dissenters learned to their cost. And if, as Montesquieu thought they will more naturally do, King and Parliament take advantage of the mutual independence which the Constitution gives them, and habitually oppose each other, a national policy is an impossibility.[1]

The Constitution as it stood at the beginning of the eighteenth century had great merits; but they lay in deeper strata than were reached by the Frenchman's analysis. These merits lay rather in the fact that it provided machinery for free, public, and orderly controversy and for political organisation, and thus contained the means for its own amendment. It would be

[1] A modern illustration, of course by analogy only, of this fact is furnished by the conflict which arose in America between President Wilson and the Senate over the Peace Treaty and the League of Nations. The President was able to carry his country a long way in a policy which the Senate did not approve and was able to reverse. The worst of evils in a government is irresponsible power; and this evil is likely to be realised where any authority in the State has a control over business consisting solely in the power of veto.

truer to say that the Constitution expressed than that it conferred the political liberty of England.

But at the time of which we are speaking it had not yet been decided how the King's government was to be carried on; or rather, it had to be decided over again. When Queen Anne came to the throne, the Constitution, far from being in a state of stable balance, was in a condition of most precarious equilibrium. There was only one way in which it could be settled on a sound and permanent basis, and that was by so transforming it, by so settling the open questions, that institutions should correspond to political realities; and this could only be achieved by securing that full sovereignty should be given to the ever-increasing force of public opinion. There had never been a time when England had lived peaceable under a balance of power. When the King first summoned a Parliament, he probably did so for his own purposes—for the same sort of reasons as those which move a modern Prime Minister to attend a party congress in a provincial town, or to give an interview to the Press. When Parliament began to feel and to show its strength, the Crown woke up to the importance of keeping it in order; and this object it pursued, not always, of course, successfully, by various means, including not only the general pressure of the royal prestige, but by more direct methods, such as the management of elections, the use of the persuasive and explanatory talents of Privy Councillors, and reliance upon the authority of the Speaker as the royal agent for the control of debate. The system of management was carried to the point of an art by Henry VIII and Elizabeth, both of whom were born political leaders, and perfectly understood the business of working with and through Parliament. The first half of the seventeenth century witnessed the complete disruption of

this method of resolving the antithesis between King and Parliament. Cromwell attempted to revive it; but though he restored in his own person the power of the Crown, he failed to recreate a genuine national Parliament. From the Restoration to the Revolution was a period of almost incessant conflict, during which, though some not unimportant improvements were achieved in the law of the Constitution, no progress was made in determining where lay its political centre of gravity.

From our present point of view, the significance of the Revolution of 1688 lay, not in the fact that it reaffirmed and emphasised, as it did, the authority of Parliament as the source and guardian of the law, but in the fact that it secured that the occupant of the throne should, in the matter which most concerned that generation, namely, the Protestant religion, have the same politics as the majority of his subjects. The Revolutionary Settlement provided no security that Crown and Parliament would not come once again to have completely discordant sympathies and aims, and would not illustrate the advantages of the Separation of Powers by checkmating each other's purposes, and rendering the pursuit of any policy impossible. The Constitution, as Montesquieu imagined it to be (and as for a time, and so far as law and recognised and approved practice went, it approximately was), could not last. Government cannot be solely, or mainly, preoccupied with not committing tyranny; it must be able to tackle great problems of State, to embark confidently upon large projects; and for this purpose it is essential that the law-making power, the money power, and the executive administration, far from spending their activities in opposing one another, and devoting their energies to "checking" and "balancing" each other's

sinister aims, should act in close and concerted harmony.

This necessary co-ordination of power was finally brought about, as a permanent form of the Constitution, painfully and hesitatingly achieved, by the establishment of Cabinet government.

CHAPTER IV

CABINET AND PARTY

"The efficient secret of the English Constitution may be described as the close union and nearly complete fusion of the executive and legislative powers."—Bagehot.

§ 1

CABINET government, in the form which it finally assumed by the beginning of the nineteenth century, and as it is known to us to-day, consists in the transfer of all, or nearly all, the public business of the Crown, except the judicial business, to a committee of Privy Councillors who are Members of Parliament (Lords or Commons), heads of great administrative departments of State, and leading members of the political party which has a majority—or is the largest party—in the House of Commons. Putting it more shortly, and in a form which conveys the greater part of the truth, though not all, we may say that the great invention of Cabinet government consisted in putting the powers of the Crown in commission in the hands of a committee composed of members of the dominant party in Parliament and in the country.

As this is the central feature of our English plan of government, we shall do well to look at it from several sides.

In the first place Cabinet government means that the King no longer takes a part in politics: he is, of course,

in close and confidential communication with the political men who govern in his name, but he is no longer the directing and deciding factor responsible before the nation for the measures taken. The whole of the political and executive power of the Crown is exercised in the King's name by men who can be criticised, attacked, compelled to answer questions, and to explain and defend themselves, and who are liable to be turned out of office. Being absolved from responsibility for their politics, the King takes no part in those confidential debates in which his Ministers thrash out the advice they will give him; in other words, he does not preside over Cabinet meetings.[1]

Secondly, the substitute for an irremovable and impeccable king might have been a single Grand Vizier or Parliamentary Mayor of the Palace. For various reasons it has not so come about. Apart from tradition,[2] and the intrinsic utility of debate in Council,

[1] The abstention of the King from Cabinet meetings, which was a step of capital importance in the development of the responsible Ministry, seems to have come about almost accidentally as a consequence of the fact that George I did not know English, while Sir Robert Walpole did not know German. But see, for a doubt whether this was the sole reason, a letter from Mr. R. R. Sedgwick in *The Times* of 17th December 1928.

[2] So contrary would it have been to all English tradition for the Crown to have settled down to being advised by a single minister, that the very name of Prime Minister had for long an ill sound, and "so late as 1761, George Grenville declared that Prime Minister is an odious title, and he was sorry that it was now deemed an essential part of the Constitution." Some of this feeling may have been due to the fact that a principal or sole minister was regarded as a peculiarly French institution. But it had a more historical foundation in the sentiment, against which the creation of the Cabinet itself had to contend, that there was a flavour of arbitrary government about any singling out of selected advisers from among the body of the Privy Council, composed as it was—or ought to be—of men of such rank and standing that it was, or ought to be, superior to "faction."

these reasons are that the administration of a great government calls for more first-class responsible work than one man can attend to; and that the distribution of Cabinet offices is a valuable, if not an indispensable, instrument for the quasi-democratic self-government of the Ministerial party. But whatever the reason may be, the fact is that the powers of the Crown have come to be transferred not to a single Minister, but to a Committee.[1]

Thirdly, Ministers are Members of Parliament and generally, in modern times, of the House of Commons; and, fourthly, Ministers are chosen from that party which has a majority in that House. These two facts, taken together, are of primary importance. It is only because Ministers are Members of Parliament, entitled to vote and speak, sharing the corporate life and the traditional feelings of the House to which they belong, taking a continuous and prominent part in all its business, familiarly known by daily association to friends and foes alike,[2] and, last but not least, both leading and depending on the votes and cheers of the party which is in the ascendancy, that it is possible to bring about that intimate union between the management of Parliament and the management of the executive

[1] An attempt was made in 1879, by unofficial members of the Liberal opposition, to fix upon Lord Beaconsfield's government the charge that the Cabinet was ceasing to act in concert, that Ministers were not kept informed of each other's actions, and that Lord Beaconsfield was exalting the influence of the Sovereign and the Prime Minister at the expense of the Cabinet, and consequently of Parliament. Though the motion was seconded by Mr. Leonard Courtney, the criticism was somewhat confused and was repudiated by Mr. Gladstone and Lord Hartington.—Hansard, Third Series, Vol. CCXLVI, p. 242.

[2] As Mr. Bernard Shaw has somewhere remarked, the Prime Minister knows the leader of the Opposition better than he does his own wife.

administration which is the essence of Cabinet government. It is a striking fact that it was almost by chance that at a critical moment in the development of the Constitution, Ministers of the Crown were not excluded from the House of Commons. When the Act of Settlement was passed in 1701, to take effect when the anticipated change of dynasty should be realised, so great was the fear of the corrupting influence of the Crown, that it was provided that "after the said limitation (of the Crown to the House of Hanover) shall take effect, no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a Member of the House of Commons." This drastic provision was so amended in 1706, before it came into force, as to permit of Ministers becoming Members of the House of Commons if they had been elected, or re-elected, after appointment. If the original plan had been carried into effect and had remained law, it is impossible to calculate what our Government would have become: it certainly could not have developed as it has done. Either the Parliament and the Crown must have remained in a relationship of perpetual loggerheads—which it is impossible to conceive; or Parliament must have dwindled to impotent subserviency; or possibly, again, some awkward arrangement, difficult to picture, would have been worked out by which the Departments of State became the secretariats of standing committees composed of unofficial Members of Parliament—some such arrangement as would exist in America if the President were eliminated. From this choice of uninviting paths we were delivered by "that remarkable system which combines unity, steadfastness, and initiative in the executive, with the possession of supreme authority alike over men and measures in the House of Commons."

§ 2

The most authoritative analysis which we possess of the nature of the Cabinet is that given by the late Lord Morley, who had himself experience of Cabinet office, in his *Life of Sir Robert Walpole*. Lord Morley distinguishes four principal features of Cabinet government. "The first is the doctrine of collective responsibility. Each Cabinet Minister carries on the work of a particular department, and for that department he is individually responsible. . . . In addition to this individual responsibility, each Minister largely shares a collective responsibility with all other members of the Government, for anything of high importance that is done in every other branch of public business besides his own. . . . The Cabinet is a unit—a unit as regards the Sovereign, and a unit as regards the legislature."

"The second mark is that the Cabinet is answerable immediately to the majority of the House of Commons, and ultimately to the electors whose will creates that majority. . . ."

"Third, the Cabinet is, except under uncommon, peculiar, and transitory circumstances, selected exclusively from one party. . . ."

"Fourth, the Prime Minister is the keystone of the arch. Although in Cabinet all its members stand on an equal footing, speak with equal voice, and, on the rare occasions when a decision is taken, are counted on the fraternal principle of one man, one vote, yet the head of the Cabinet is *primus inter pares*, and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority. It is true that he is in form chosen by the Crown, but in practice the choice of the Crown is pretty strictly confined to the man who is designated by the acclamation of a party majority. . . .

The Prime Minister, once appointed, chooses his colleagues and assigns to them their respective offices. . . . The flexibility of the Cabinet system allows the Prime Minister in an emergency to take upon himself a power not inferior to that of a dictator, provided always that the House of Commons will stand by him. In ordinary circumstances he leaves the heads of departments to do their work in their own way. It is their duty freely and voluntarily to call him into council on business of a certain order of importance. With the Foreign Secretary alone he is in close and continuous communication as to the business of his office. . . .[1]

Let us consider some of these very authoritative sayings. Why is it necessary, for instance, for the Cabinet to be subject to a collective responsibility? This means, as Lord Morley says, that "the Chancellor of the Exchequer may be driven from office by a bad dispatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid Minister of War."

The explanation is that the rule of collective responsibility follows as a practical consequence from the other rule that Ministers shall be members of the same political party—or rather the two rules are indissolubly connected. This is shown by the fact that the fall of an administration carries with it not only the Ministers who are members of the Cabinet, but also all those other Ministers,

[1] The Prime Minister is usually First Lord of the Treasury, which means in practice that he is not the administrative head of any one department, the Treasury having the Chancellor of the Exchequer for its Minister. But other arrangements have been made. Thus Mr. Gladstone, in 1873, took the Chancellorship in addition to the office of First Lord; in 1885, and again in 1887, Lord Salisbury combined the seals of Foreign Secretary with the Premiership; and this precedent was followed by Mr. Ramsay Macdonald in 1924.

of whom there are always a number, who, although they are responsible political heads of departments, are outside the Council—occupying, in fact, a position which is peculiar to England. The fall of a Ministry is the fall of a party, and the officers of all ranks must needs retire with their troops.

There is, however, another reason in reserve. If it were regarded as possible for a Cabinet Minister to disculpate himself from the decision of his colleagues, after the event, after the course decided upon had proved unsuccessful or unpopular, the mutual confidence —meaning both the trust and the secrecy—which is essential to the working of the Cabinet would be destroyed. If it were possible for a Minister to say, "I was not consulted," or "I did not agree," the result must be that the most private transactions of the Cabinet would of necessity be divulged to the public.[1]

If it is asked why it should not be possible for some of the public departments to be kept apart from the political government which centres round the Prime Minister,[2] the reply is in one word—"Finance."

[1] And if anyone is so "democratic" as to think that the proceedings of the Cabinet, being of public concern, should not be shrouded in secrecy, he may be reminded that publicity would merely cause some smaller and still more informal body to replace the Cabinet, as the Cabinet once upon a time replaced the Privy Council, as the organ for the discussion of policy.

[2] The French statesman, M. Caillaux, brought forward a proposal a few years ago for a revision of the French Constitution, designed to correct the traditional rule of collective Cabinet responsibility, which is also observed in his own country. This proposal contemplated the making of a distinction between political and technical ministers. The political ministers, who would alone form the Cabinet, would stand and fall together. The technical ministers, such as the Ministers of War, Marine, Public Works, Posts, and Fine Arts, would stand alone, dissociated from the political Cabinet, and be judged, each on his own merits, as a departmental administrator.

Departments of the National Government which depend for their proper administration upon being able to bring their needs continually and effectively before the Treasury, must have at their heads politicians who share the political fortunes of the Cabinet which controls and distributes the national revenue. The department from the successful or unsuccessful administration of which the party in office was not to expect any credit or blame, would be ill-equipped for securing liberal treatment from the sound party-man at the head of the Exchequer. It was finance which chiefly made it possible for the Crown to be brought under the control of the House of Commons; and at the present day finance is a vital factor in securing the unified control of the Cabinet on all branches of the administration.

§ 3

Cabinet government means party government. As Professor Trevelyan has reminded us in his Romanes lecture "the secret of the English Constitution as it was developed in the course of the eighteenth century was the steady confidence reposed by the parliamentary majority in the Cabinet of the day. If that confidence is withdrawn every few months government becomes unstable, and men cry out for a despotism, old or new. In eighteenth-century England the requisite confidence of Parliament in the Cabinet could have been obtained in no other manner than through the bond of a party loyalty held in common by the Cabinet and by the majority of the House of Commons."

This is true to-day, as it was at the time of which the lecturer was speaking. Party provides the machinery which secures that the legal power and the political privilege of Parliament on the one hand, and of the

Crown on the other, shall, for reasonably long periods of time, be exercised in close combination and in mutual confidence, and not in opposition or in an arm's-length alliance. These objects party attains in the only practical manner by entrusting the powers in question to a "unified command," to a single staff of responsible and disciplined leaders.

Though there has perhaps hardly ever been a time when Parliament did not, in a very general way, reflect the feelings or, it may be, in regard to some matters, the indifference,[1] of the nation at large, it has only been by a slow process that, except in times of unusually high political temperature, the common opinions of the country on public questions have come to exercise a commanding influence over Parliament. Westminster was for centuries the only place where it was possible for ordinary men to acquire the experience necessary for the formation of definite political opinions, and to form the personal ties and alliances which go to the creation of parties. It was only in the House of Commons that men who were not peers, barristers, or Londoners could hear the news, listen to the arguments, and be disciplined to the compromises and the loyalties which make political co-operation possible. As, with the spread of education, the improvement of means of communication, and the development of the Press, political life was gradually transferred to the

[1] But neutrality has sometimes taken a vigorous form. One of the most remarkable expressions of political feeling to be found in our history is the organisation of the "clubmen" in 1644. These were "yeomen and country people, armed only with clubs, who hoped by numbers and concert to resist effectually the military marauders of both parties, declaring themselves neither for King nor Parliament, but for their own liberty and property. They were, of course, regarded with dislike on both sides."—Hallam.

constituencies, managing men came to appreciate in an increasing degree the capital importance of popularising the organisation of parties. The extension and nationalisation of the franchise has naturally emphasised this process; and the result is that the party ties and organisation which at one time included few beyond the circle of Members of Parliament, have, in the course of the last century, come to be based primarily upon the electorate at large. Indeed, as we all know, there is, at the present day, an evident tendency for the great, nation-wide, solidly organised party organisations in the country to deal directly, as it were, with the leaders of the party, over the heads of Parliament, and to regard private members and their election as little more than the necessary machinery for bringing one conspicuous man or group of men into office.

For a political party to be able to play this vital role in the mechanism of government it must be something more than an association for the promotion of a single political object. It must aim at putting its men in office, at forming an administration; which is to say that it not merely seeks to effect some one reform, however important—as did, for example, the Anti-Corn Law League—but it must aspire to take over the whole government of the country, both its home and its foreign policy. A political party must therefore not only be inspired by a wide range of public interests, but must possess something like a corporate mind, a capacity not only for entertaining and giving effect to its distinctive tenets upon familiar subjects of controversy, but the power of promptly forming party opinion upon the new questions which arise, sometimes with little previous notice. And a party must have such a relation to its leaders for the time being that it is strongly disposed to trust and to support them in

matters of administrative discretion, to the rights and wrongs of which it is impossible to apply cut and dried political formulæ, or as to which it is impossible for the public to be placed in possession of full information. In short, a party lives on party spirit.

Furthermore, it is a vital feature of party as an instrument of government that it shall preserve its continuous corporate identity, its machinery of self-government, and its responsible character, when out of office as well as when in office.

In England we have come to regard the organised and responsible opposition, continually criticising the administrative, financial and legislative measures of the ruling party, as an essential part of the system.[1] This incorporation of the adversary among the working parts of the machine is expressed in the consecrated phrase "His Majesty's Opposition."[2] Even when

[1] "Only a nation which had come to expect from some quarter unceasing opposition to every single institution of law and State, and to regard it as natural, nay, indispensable and healthy, could have created what has since come to be regarded as the special character of the English Parliamentary system."—Redlich.

[2] "The phrase originated in a half-derisive speech by Hobhouse, afterwards Lord Broughton. Hobhouse was then in opposition, and in a discussion on 10th April 1826 on the union of the office of President of the Board of Trade with that of Treasurer of the Navy, he remarked, 'It is said to be hard on His Majesty's Ministers to raise objections of this character. For his own part he thought it was more hard on His Majesty's Opposition to compel them to take this course.' Canning hailed the phrase as a happy one, and Tierney followed with a speech which had much to do with giving Hobhouse's phrase the permanence it has since had in the language of Westminster and of British politics. 'My right honourable friend,' Tierney said, 'could not have invented a better phrase to designate us than that which he has adopted; for we are certainly to all intents and purposes a branch of His Majesty's Government. . . .'"—Porritt, *The Unreformed House of Commons*, I, 510.

looked at from the point of view of the party which for the time being bears the responsibilities of government, the Opposition is something very much more than a group of defeated and impotent enemies. The Opposition represents a formidable part of the nation; it offers a possible alternative government and, according to normal experience, it may at any moment be called upon to provide an actual government; its leaders may, in the not infrequent cases where difference of opinion follows the line of the official versus the unofficial view rather than of the Ins against the Outs, be expected to rally to the support of the administration.[1] With the leaders of a disciplined Opposition it is possible for the Government to have understandings on such matters as the allotment of the time of the House, the order of debate, the composition of committees; to the same leaders it is possible to impart confidential information; finally, and above all, it is to the Opposition that the party in office looks, without fear of being disappointed, for the opportunity of placing its policy before the nation in the most vigorous and interesting manner, namely, in direct reply to weighty and specific attack.

It is only in England, and in the British Dominions, that so great a constitutional superstructure has been built upon the extra-legal and voluntary foundation of political parties. That it has been possible to found so much upon so adventitious a basis is due to causes which reach widely and far back in our national life.[2]

[1] The Ministry would expect, for example, the assistance of the front Opposition bench in maintaining the authority of the Speaker, in resisting a premature demand for information on foreign and military affairs, or in preventing the discussion of an irresponsible motion of censure on a judge.

[2] "The proper study of the party system would take us far beyond the four walls of Parliament. It would trace the roots of

It must suffice here to remark that the English political parties owe their close and tough texture to the fact that they are not only associations, but societies. Aiming, as they do, at providing a governing representation of all the principal concerns of the nation, they draw their strength from wider sources than the momentary issues of the day, are fortified by a thousand disparate personal and social links and loyalties, and from unexpected alliances of sentiment, interest, and tradition.

That it provides an organised connection between Ministers of the Crown, and a permanent political connection in Parliament and the country is not the only convenience of the party system. Hardly less important is the fact that it furnishes a smoothly working machinery for effecting a change of administration. Long before the days of party cabinets, Parliament had acquired the power of punishing the King's Ministers by impeachment, and of obstructing their policy by refusing supplies. Both these methods of opposition have long gone out of fashion, as being clumsy, violent, and unnecessary.[1] The system which has replaced these devices has the double advantage of working at a low

party allegiance and enmity in the local life and circumstances of each shire, town, and district; it would delve into the history of the East India Company, the Bank of England, the origins of journalism, the rivalries of opposing systems of law; it would be deeply concerned with English religion and with English scepticism; with the relation of landlord and tenant, employer and employed; with the rivalry of old and new wealth, of town and country, and with a hundred other aspects of daily life."—Trevelyan, *The Two-Party System*, p. 7.

[1] Impeachment is a trial before the Lords on the accusation of the Commons. "During the whole of English history there have not . . . been seventy, and a full quarter of all of them belong to the years 1640-1642."—(Maitland). The last case was the impeachment of Lord Melville (Dundas) in 1806, for the non-political offence of malversation of official funds. He was acquitted.

political temperature and of providing an alternative government.[1]

§ 4

It will be seen, then, that the Constitution, far from resting upon a separation between the power of the Crown and the power of Parliament, is based upon an intimate union between the two. And this result has been effected, not by the destruction of the powers of the Crown, not through their absorption by Parliament, or by the House of Commons, but by their being put in commission in the hands of a body which, though it is subject to a general control by the House of Commons, is distinct from Parliament and has a certain very real independence of Parliament. Cabinet and Parliament are fellow-servants, and the common master is the electorate. The fact that the "Crown-in-Commission" is something more than a standing Committee of Parliament is shown by various signs. In the first place, the Cabinet can put an end to a Parliament by advising a dissolution. "A Cabinet," says Bagehot, "though it is a committee of the legislative assembly, is a committee with a power which no assembly would —unless for historical reasons, and after happy experience—have been persuaded to entrust to any com-

[1] The establishment of a clear demarcation between two parties in the House of Commons seems to have been facilitated by the two tiers of seats facing each other, as in a cathedral choir, which characterised St. Stephen's Chapel, in which the House met from about 1547 till the chapel was burned down, in common with the greater part of the Palace of Westminster, in 1834. It was during the Speakership of Onslow (1727-1761) that "members began generally to seat themselves on different sides of the chamber, to the right of the Speaker if they were supporting the Government, to the left if they were in Opposition."—(Porritt.) The semi-circular form adopted by continental parliaments may have played its part in encouraging the formation of numerous small groups.

mittee. It is a committee which can dissolve the assembly which appointed it; it is a committee with a suspensive veto—a committee with a power of appeal. Though appointed by one Parliament, it can appeal if it chooses to the next."

Parliament, the House of Commons, is not entitled to be informed as to the proceedings of this powerful committee. Indeed, a minister is precluded from revealing to the House the course of discussion in the Cabinet on any subject unless he has the previous consent of the Sovereign. Parliament is entitled to be fully informed, so soon as the public interest permits, as to the decisions of the Cabinet, and is entitled—has the power to insist on the right—to have those decisions explained and justified. But what it hears is the official case for the decisions taken in the name of the Crown; Parliament is not, in general, entitled to hear anything of the dissensions and compromises which lie behind.[1]

Even individual ministers may on occasion find it to be necessary to rely upon the fact that they are the confidential servants of the Crown, and not merely the delegates of Parliament. They must, of course, never disclose the tenor of their personal communications with the Sovereign. This is because to do so would be to bring the King into the political limelight. But further than that, ministers may have, or conceive that they have, a duty which they owe to the impersonal "Crown" to refuse information with regard to official business. There have been cases where such a refusal has been based, not upon a general plea of the public

[1] Bagehot tells the story that "at the end of the Cabinet which agreed to propose a fixed duty on corn, Lord Melbourne put his back to the door and said, 'Now, is it to lower the price of corn, or isn't it? It is not much matter which we say, but mind, we must all say *the same*."

interest, but upon the more specific ground of a constitutional duty of secrecy.[1] Then, further, as a matter of practical politics, the Cabinet has acquired a kind of dictatorial power over Parliament. It is an old rule that no financial measure can be introduced save on the proposal of a Minister of the Crown. But in modern time it has come about, owing to the great and growing importance of legislation in the conduct of government, and the elaborate character of the laws that have to be made, that the Cabinet is compelled to monopolise for its own official measures almost the whole of the time of Parliament. A margin is still left for the discussion of current events; only an evanescent minimum remains available, in the House of Commons, for private members' bills.[2] But it is not only the time of the House of Commons which is thus requisitioned by the administration. That the Cabinet has acquired or can

[1] In 1882 Sir William Harcourt, then Home Secretary, had issued a warrant under the Post Office Act directing the correspondence of certain persons suspected of sedition in Ireland to be detained and opened. Being questioned on the matter in Parliament, he replied that he had the right to cause letters to be opened and retained indefinitely, and that it was impossible for him to give any account of the matter to the House of Commons. "This is a power wihch is given for purposes of State, and the very essence of the power is that no account can be rendered." Sir James Graham had given a similar reply when, in 1844, he was attacked for causing Mazzini's letters to be intercepted.

[2] "Sir Charles Wood, afterwards Lord Halifax, first took his seat in the House of Commons in 1828, and, when talking to Mr. Nassau Senior in 1855, he dwelt on the changed attitude of the Government towards legislation. 'When I was first in Parliament,' he said, 'twenty-seven years ago, the functions of government were chiefly executive. Changes in our laws were proposed by independent members, and carried, not as party questions, by their combined action on both sides. Now, when an independent member brings forward a subject, it is not to propose himself a measure, but to call to it the attention of the Government.'"—Ilbert, *Parliament*, p. 52.

exercise this prerogative is due to the fact that it commands a working majority of the votes. And this steady and almost mechanical source of power enables ministers not only to propose, but to dispose. Government bills become law. Not, of course, with no detail unchanged; Ministers are not entirely impervious to criticism, especially when, though originating perhaps with the Opposition, it is found to have impressed the Government's own supporters. But speaking broadly, ministerial measures are regarded and treated as integral parts of the policy to carry out which they have taken office. This enormous power is of comparatively modern growth and has been, and still is, the subject of criticism.[1] It derives from several causes. One is that it is injurious to the prestige and authority of the Ministry not to carry its measures; and the Parliamentary majority whose votes have put it on the Treasury Bench have good party reasons for not wishing to see the Ministry

[1] In 1873 the Conservative Opposition, with the assistance of some recalcitrant Ministerialists, defeated Gladstone's Irish Education Bill. Gladstone having resigned, Disraeli refused either to take office, or to ask for the dissolution of Parliament. To Gladstone's contention that, having brought about the defeat of the Government on a major measure, he was under the obligation to take charge, Disraeli replied that this thesis amounted to saying "That whenever a Minister is so situated that it is in his power to prevent any other Parliamentary leader from forming an administration likely to stand, he acquires thereby the right to call on Parliament to pass whatever measures he and his colleagues think fit, and is entitled to denounce as factious the resistance to such measures. Any such claim is one not warranted by usage, or reconcilable with the freedom of the legislature. It comes to this: that he tells the House of Commons, 'Unless you are prepared to put someone in my place, your duty is to do whatever I bid you. To no House of Commons has language of this kind ever been addressed; by no House of Commons would it be tolerated.'"—Morley, *Life of Gladstone*, III, p. 453. Gladstone resumed office, much damaged.

weakened. Then the Ministry holds over the House of Commons a powerful disciplinary weapon—the threat of a dissolution. But the most important cause of the quasi-dictatorial power of the Ministry lies in the fact that the real centre of political authority has moved from Parliament to the electorate. Fifty years ago a Member might hope to be able to justify to his constituency a vote which had helped to defeat the Government which he had been elected to support. This would be much more difficult at the present day. The real power of the House of Commons is due at the present day to two causes. In the first place, in spite of the general obligation of the majority party to support their leaders, they are in a position to exercise influences upon the measures proposed, and upon the way in which administrative questions are dealt with. They have the advantage over the electors, and over the party men outside Parliament, of much greater information and of daily contact with each other and with Ministers. Even the Opposition, impotent as it may seem to the newspaper reader, has, in a lesser degree, similar advantages. It is not without importance, indeed, it is of capital importance, that the House of Commons is a body which meets for about seven hours a day for about nine months of the year. All of its members who possess the necessary specific gifts of personality, of intellect, and of speech, can and do bring to bear upon their leaders and upon their opponents, of course in very various degrees, the influence due to knowledge and to continual personal contact.[1]

[1] Subject to these considerations, there appears, at the present day, to be almost as much unreality in current phrases such as "Parliament has thought fit," "in the judgment of Parliament," and so forth, as there is in the traditional language which ascribes public acts to the King. The two capital realities are the Ministry and the electors.

The second source of the effective power of Parliament is that it is only through Parliament that a man (or woman) can become a Minister. To attain high office under the Crown in England it is necessary for a man to convince of his fitness not the Sovereign, and not the electorate, but the House of Commons.[1] The qualities which carry a man to the front benches are the qualities which make it acceptable to his fellow-members that he should be raised above them, the qualities which make his admission to that order an accession of strength to the Prime Minister, or to the Leader of the Opposition as the case may be; and these are qualities which must of necessity have been discovered and tried in the life and business of the House of Commons.[2]

§ 5

We have spoken of the power of dissolution as one of the means by which the Cabinet secures for itself a certain independent authority over Parliament. We are so familiar with the idea that Parliament can, by an exercise of the prerogative of the Crown, be dissolved before the end of the time fixed by law for its maximum life, that we hardly appreciate how significant and peculiar this feature of our Constitution in fact is.

[1] It is a remarkable fact that the late Mr. Joseph Chamberlain offers the only recorded instance of a statesman whose rise to high political rank has been promoted by previous distinction in local affairs.

[2] Mr. Winston Churchill has said of his father that "he became Leader of the House of Commons, not because he had schemed for it, nor because it was his right in lawful succession, not assuredly because the Conservatives loved him or felt that they would be safe in his hands. He *was* the leader at that moment—natural, inevitable and, as it seemed, indispensable."—*Life of Lord Randolph Churchill*, p. 530.

In the hundred years from 1829 to 1929, twenty-seven Parliaments have been dissolved. Of these dissolutions two were due to the demise of the Crown. Eight were in substance due to the completion of the legal term.[1] Four were due to conflicts between the Commons and the Lords. One was an unfortunate attempt of the King to get rid of his Ministry. The remaining twelve dissolutions, that is to say, nearly half the total number, were granted by the Crown at the request of Ministers, who sought by these means to strengthen their position in the Commons. It is evident that this practice is closely connected, both as cause and effect, with the comparative independence which Cabinets enjoy as regards the House of Commons, and with their corresponding dependence upon the national party organisations. The moral is pointed by a comparison with France. In the period of above fifty-four years, during which the Third Republic has been governed by its present constitution, the French Parliament has only once been dissolved—in 1877—before the elapse of its full statutory life of four years.[2]

To the immunity of the Chambers from the danger of dissolution at the instance of the Ministry have been attributed the facts: (1) that in France the Executive government is weaker, and the Chambers, particularly

[1] Allowing for the fact that it had come to be the recognised custom for Parliament to be dissolved not later than about a year before the completion of the seven years allowed by the Septennial Act.

[2] The power of dissolution is vested in the President acting with the consent of the Senate.

The dissolution of 1877 was inspired by Marshal MacMahon's desire to promote the fortunes of the Conservative and Clerical party. Its failure as a piece of tactics was so conspicuous as to throw lasting discredit upon Presidential dissolutions. But, of course, the need for the consent of the Senate makes a great difference between the situation in France and in England.

the Lower House, stronger, than in England; and (2) that while the national parties are weak the tendency of Parliament to break up into groups is strong. The intervention of the Chambers in what in England is considered to be the business of the King's Ministers is seen not only in the important part played by French Parliamentary Committees in framing policy—particularly financial policy—but also, it is said, in their persistent interference in details of administration.

It may be that in England prerogative dissolutions will be less common in the future than they have been in the past. The operation of the Parliament Act may well have this effect, both in rendering acute conflicts between the Ministry and the Lords less probable, and by the reduction of the legal life of Parliament to five years. On the other hand, the appearance of three parties may work to counteract these causes. In any event the national habits would seem to be too fixed for it to be at all likely, even were prerogative dissolutions to fall into desuetude, that the effect would be to replace the House of Commons in the position of supremacy now occupied by Cabinets in alliance with national parties.

§ 6

How far does Cabinet government depend upon the continuance of the two-party system? Like all unsettled constitutional issues of any importance, this is a live political question; and, as such, cannot be fully examined in these pages. Its final settlement depends in great measure upon the policy of living statesmen, and upon the unknown future reactions of public sentiment. But a few remarks may not be out of place.

The essential feature of Cabinet government, when there are only two parties, so that one or the other must have an absolute majority in the House of Commons, is that there is a practically effective agreement on all major questions between Ministers and their supporters. This agreement may to some, perhaps considerable, extent be artificial, and due to compromise, or to the avoidance or postponement of questions on which agreement cannot be arrived at. But the attitude of mind encouraged by association in political conflicts tends strongly to bend opinion and feeling in both the leaders and the led to "*idem sentire de republica*." A sentimental *esprit de corps* presides over and creates unity in opinion and in action, often by processes of which the psychology is easier to appreciate than the logic. This general spirit of party unity makes two things possible; it makes it possible for the Cabinet to count on support for the many decisions which it or individual Ministers must take without previous explanation and discussion; and it constrains members of the Cabinet themselves to forgo their differences and to agree upon common action.

Now the existence of more than two parties in the House of Commons raises no novel problems so long as the party in office possesses a homogeneous majority over all others, as was the case in the Parliament of 1924-29.

The situation of interest for the student is that which exists at the moment of writing (1929), when no party has an absolute majority, and when the Ministry depends for its maintenance in office upon the votes of a party distinct from its own, following different leaders, and professing divergent principles.

This state of parties might, theoretically, have led to a coalition. Experience has shown that coalitions are

not stable arrangements; they are ended, before long, either by fusion or by disruption.

Their instability is due to the fact that the differences of political outlook, to say nothing of the personal dissympathies between the two partners, will not avail to keep them long distinct, if the temperature of those sentiments proves to be low enough to enable the allies to work harmoniously together. A permanent coalition would mean that each partner was prepared, almost invariably, to aquiesce in the decisions of joint conferences, or, what would be a greater strain, in the conclusions of secret conclaves in Downing Street in which the leaders of the other party possessed an undoubted authority of unknown strength and bias.

There has been no coalition; and a necessary part of the majority upon which the present Government relies is rendered for reasons other than party loyalty. What effect may we anticipate that this state of parties, supposing it to be permanent, will have upon the working of Cabinet government? In the first place it is to be remembered that what we have to-day is something very different from a complete disintegration of all party connections. If the whole tradition of party organisation were so greatly enfeebled in England that Parliament and the electorate became dissolved into a number of comparatively small groups, such as are seen in Germany, for example, it seems not unlikely that the result might be greatly to enhance the personal responsibility of the Sovereign. The need would be felt more acutely than it is at present for the exercise of an impartial diplomacy in constructing coalition governments, and for judicial impartiality in dissolving Parliament. As it is, all those capital advantages which party connections derive from nation-wide size, conspicuous and acknowledged leaders, catholicity of

purpose, and internal discipline, are preserved. What is lost is the assured ascendancy of the Cabinet over the House of Commons. The Ministry of to-day has of necessity to reckon with the possibility of an adverse vote of the House, as used to be the case a hundred years ago.

It has recently been argued, by a brilliant anonymous writer, that the consequent restoration of the independent judgment and authority of the House of Commons would be highly beneficent.[1] However that may be, we are here only concerned with a problem in constitutional statics, namely whether the Government of the country can be carried on without the assured, organised, and, to some extent, unquestioning, support of a parliamentary majority.

It is true that it has in the past not been always thought vital for an administration to carry its measures. Liberal administrations were able to govern for many years in spite of the frequent rejection of their legislative proposals by the House of Lords. The Parliament Act would appear to have put an end, for practical purposes, to this particular form of the "Separation of Powers." But if the present balance of three parties were to remain substantially unaltered, no appeal to the electorate would provide an escape for an administration, of whatever political colour, which does not win a clear majority, from the position of "office without power."

A House of Commons which has recovered its independence has, at any rate theoretically, certain indisputable merits, of which not the least is that it may be expected greatly to increase the reality of parliamentary debate, and the public interest in parliamentary proceedings. It may also recover that efficacy as a check upon the encroachments of the bureaucracy which many

[1] *Robinson the Great* (Christophers).

think desirable, and which, at present, when for so many purposes the Ministry seems to serve merely as a channel for the transmission to Parliament of the proposals of Whitehall, is impossible.

But an independent House of Commons would have power without responsibility. Its irresponsibility would be likely to show itself in the rejection of measures which, in the view of the responsible administration, are integrally connected with other measures in which the House is ready to acquiesce; as, for example, was the case in regard to Pitt's intention of combining the Act of Union with Ireland with Catholic Emancipation. It is a mistake to think of statesmanship as consisting in the solution on their isolated merits of a series of disconnected problems. A political authority —for such the heterogeneous Opposition with a majority would be—which can only make itself felt by saying no —which only stands for a negative—seems unlikely to be regarded by the nation as a permanently satisfactory phenomenon.

CHAPTER V

THE KING

"Tout fuit in luy et vient de lui al commencement."—*Year Book of Edward III.*

THE most intricate, the least familiar, and the most picturesque part of our Constitution is that which relates to the Kingly office, and to the way in which this most ancient and dignified of our institutions is fitted into the machinery of a modern democratic and parliamentary government. In no other part of our national life is there to be found a more vivid illustration of the continuity of our history.

§ 1

And first we must distinguish between the King and the Crown. The King is a natural person. The Crown is a bundle of sovereign powers, prerogatives, and rights—a legal idea. Historically, the rights and powers of the Crown are the rights and powers of the King; but while, in contemplation of law, this is still in general the case, the Constitution now requires these powers and rights to be exercised, in substance, and usually, not by the King personally, but by his Ministers.

The position is not very easy to describe both clearly and correctly. Let us first make a sacrifice of legal accuracy. Think of the nation as a corporation—a sublimated public company. The charter or articles of

association of this company provide for a board of directors, and almost continuous meetings of plenipotentiary representatives of the corporators or shareholders. The corporation owns a vast amount of property, and its directors have wide powers of government, most of which are derived from resolutions of the general meetings, though some are inherited from the person who was the proprietor of the business before it was turned into a company. The former owner has not completely retired—far from it. He is still a very important part of the legal constitution; he is still the honorary chairman both of the board of directors and of the general meetings, though he never attends the former, and only appears at the latter on ceremonial occasions. All decisions both of the board and of the general meetings are promulgated in his name; the company's seal bears his name and arms. Practically all the corporation property stands in the name of the former owner as trustee for the corporation. Though not a director, nor responsible for the acts of the board, the proprietor is kept informed of their deliberations, and takes an advisory share in their resolutions. He may, from time to time, though rarely, be called upon to assist in the reconstitution of the board. On the other hand, although as a result of the incorporation of the old family business the proprietor has almost wholly surrendered practical control of its affairs, as well as the beneficial enjoyment of its possessions, he has not forfeited his capacity as a private person to have property of his own. It is true that the process of transformation of the royal business into a national business was brought about in so gradual and deferential a manner, and the pretence that there had been no change of ownership has been so carefully adhered to, that the proprietor has even at times seemed to have forfeited his

private rights; but this unintended consequence has been corrected.

We must now make haste to say that this analogy, though perhaps excusable as a crude picture of the relations between the King and the Crown, is legally inaccurate. There has never been any act of incorporation of the national business. It is still the King's business. Such terms as "the State," "the Nation," "national property," the "powers of the Government," are not terms recognised by the law of England. The property and powers of the national government are the property and powers of the King "in right of his Crown"; which means that they are vested in His Majesty, or in his officers on his behalf, to be exercised and used in the manner, and subject to the restrictions, imposed by the law and usages of the Constitution to secure the paramount interest of the public. Anything of which it can be shown that it belongs to the King, but cannot be shown that it is fixed with a charge or trust in favour of the public, belongs to the King as private property.[1]

We will now first consider certain rules and usages relating to the King as a natural person.

§ 2

The succession to the throne is governed by the Act of Settlement, which was passed in the last year of the reign of William III. It being apparent in 1701 that neither King William nor the Princess Anne would leave descendants, it was decreed that the Crown

[1] In the course of recent proceedings by the Crown to vindicate its title to money found in the hands of a corrupt police officer, it was suggested from the Bench that the funds in question might come under this principle, and belong to the Privy Purse.

should pass, after the death of Anne, to the Electress Sophia of Hanover "and the heirs of her body being Protestants." Heirship is determined by the rules of the common law applicable to land; consequently women are not excluded, as they were by the so-called Salique Law, in the old French monarchy. Both the Bill of Rights and the Act of Settlement declare that no person shall ascend the throne who is a Roman Catholic or is married to a Roman Catholic; and that adherence to that faith, or marriage to a Roman Catholic, shall effect a forfeiture of the Crown. The Act further requires the King or Queen to join in communion with the Church of England, but omits to say what is to happen if he or she fail to do so. The King was also formerly required to make a formal Declaration against Transubstantiation; but, by the Accession Declaration Act, 1910, this requirement is replaced by the obligation to sign a modified Declaration to the effect that he is a "faithful Protestant," and that he will "according to the true intent of the enactments which secure the Protestant succession to the throne" . . . "uphold the said enactments to the best of (his) powers according to law."

The Act of Union with Scotland provides that the "succession to the monarchy of the United Kingdom of Great Britain and of the Dominions thereunto belonging" shall be governed by the Act of Settlement. The Act of Union with Ireland contained a clause to a similar effect. The Irish Treaty of 6th December 1921 (confirmed by the Irish Free State Agreement Act of 1922), provides that "the law, practice and constitutional usage governing the relationship of the Crown . . . to the Dominion of Canada . . . shall govern (its) relationship to the Irish Free State." The British North American Act of 1867 provides that "the pro-

visions of this Act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland." Similar clauses are contained in the Australian and South African Constitutions. The Parliament of Northern Ireland is precluded from legislating on the subject of the Crown. The very theoretical possibility of the Empire being split by divergent legislation on the subject of the succession to the Crown seems by these provisions to be effectually guarded against.

§ 3

No general Act has ever been passed providing for a regency in all future cases in which the King might be or become subject to incapacity, such as infancy or lunacy, though on numerous occasions Acts have been passed in contemplation of a particular case of minority.[1] Serious difficulties arose on this subject in 1788, on the occasion of George the Third's first madness. The Government, led by Pitt, were in agreement with Fox and the Opposition that the Prince of Wales (afterwards George IV) ought to be appointed Regent; but they differed as to the method. The alternatives were either that Parliament, recognising that the Prince of Wales

[1] It is said that "the law does not recognise the incapacity of an infant King; and, in the event of a sudden demise of the Crown before a Regent had been appointed, the infant Sovereign would be able to give his assent to an Act of Parliament appointing a guardian for himself and a Regent for the Kingdom."—May, *C. H. E.*, I, 219. The common belief that an infant Sovereign attains his majority at the age of eighteen is based, not on any rule of Common Law or of Statute, but on the usage observed in Regency Acts, of providing for the Regency to terminate when the Sovereign attains this age.

was of right entitled to the Regency, should content itself with requesting him to assume that office; or that an Act of Parliament was necessary. The former view was held by the Opposition, who, being politically allied to the Prince, did not wish his powers as Regent to be limited. Pitt was driven to the opposite position partly by the desire to impose restrictions upon the Regent's powers, an object which could not be attained if he were summoned to the position by Address. The difficulty about proceeding by Act of Parliament was that the King, by hypothesis, was incapable of giving his consent. Pitt's plan for meeting this obstacle was to resort to a somewhat vigorous fiction, and to replace the King's consent by a resolution of both Houses of Parliament, authorising the Lord Chancellor to affix the Great Seal to a Commission for the purpose of giving the royal assent to the Bill.[1] His method of procedure, though strongly resisted as unconstitutional, was in process of being carried into effect, when the King recovered. This precedent was followed in 1810, when the King's lunacy finally incapacitated him, and in pursuance of resolutions of the two Houses the Great Seal was affixed first to a Commission for opening Parliament, and then to a Commission for giving the royal assent to the Regency Act.

On the accession of our present King in 1910, a Regency Act was passed which made the Queen Regent in the event of a child under eighteen years of age succeeding to the throne. The Regent was precluded from giving the royal assent to any bill for changing the

[1] The Irish Parliament elected to proceed by the method advocated by the English Opposition, and presented an address to the Prince of Wales requesting him to assume in Ireland the suspended functions of royalty in the name of his father. This incident is a reminder that Ireland might have chosen a different Regent.

succession to the throne, or repealing a Scottish Act of 1707 directed to securing the Protestant religion.

On the occasion of the King's recent serious illness, on 4th December 1928, a Council of State was appointed, composed of the Queen, the Prince of Wales, the Duke of York, the Archbishop of Canterbury, and the Prime Minister. They were empowered to hold meetings of the Privy Council and to sign documents on behalf of His Majesty; but not to dissolve Parliament, to grant any peerage, or to do anything which they had reason to believe that His Majesty would not approve. This Council was created by a Commission under the Great Seal, issued in pursuance of Letters Patent under the sign manual. It created, in substance, with the real and not fictitious assent of the King, something in the nature of a Regency.[1]

§ 4

There is an ancient doctrine which, though it no longer has any important practical application, is sufficiently curious to deserve mention. According to this doctrine the King's power was so strictly personal to himself, and his tenancy of the Crown was so much a mere life-interest, that the virtue and effect of all his acts was extinguished by his death—by the "demise of the Crown."[2] So the King's death dissolved Parliament,

[1] This measure, regarded as a precedent, appears to settle the question, which was formerly regarded as open to doubt, whether the Sovereign has the power, by virtue of his prerogative, to depute others to sign for him.

[2] The same theory was held in France under the old monarchy, and was expressed in the doctrine that though the title to the Crown passed "au plus proche mâle par la loi fondamentale de l'Etat," it was in reality not "hereditary" but "successive." So it was held that Louis XIII had no power to prevent his infant son and successor, Louis XIV, from appointing his mother sole Regent during his minority.

his writs of summons having lost their virtue, the commissions of the judges and the appointments of Privy Councillors terminated, all judicial proceedings fell to the ground, and there was apparently at one time a prevalent opinion that charters granted to boroughs, and legislative proclamations (when the King still had power to make them) lost force at his death, and required to be renewed by his successor. The "King's Peace" also came to an end, and, until it was proclaimed anew by the new Sovereign, it was said that "every man that could forthwith robbed another." This quaint and anarchical rule has only been repealed by gradual steps. An Act of Edward VI set matters right in respect of legal proceedings. By Statutes of William and Mary and Queen Anne, it was provided that Parliament should continue for six months after the death of the Sovereign, unless sooner prorogued or dissolved by his successor; and the Representation of the People Act, 1867, makes the duration of a Parliament independent of the demise of the Crown. An Act of Queen Anne kept the Privy Council in existence for six months after the death of the Sovereign, unless sooner determined by the successor, or unless, as is most usual, the old members are re-sworn.[1] The same Act kept the commissions of the judges in force for the same period; and an Act passed in the first year of George the Third's reign provided that the demise of the Crown should have no effect upon judicial commissions.

Finally, the "Demise of the Crown Act" (1901) provides that "the holding of any office under the

[1] On 29th January 1648-9, the day before the execution of Charles I, the Parliament decreed "that all writs, patents, commissions, etc., shall stand good, notwithstanding the death of the King."—Whitelock's *Memorials*.

Crown within or without His Majesty's Dominions shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown."

§ 5

The King as a natural person has property and revenues distinct from those of the Crown. As we have already explained, this was not originally possible. In the Middle Ages the King was expected to "live of his own." The revenues of his domains, the feudal dues payable by the "tenants in chief" of the Crown, and certain other sources of income of less importance, were supposed to be enough to enable him to provide, not only for the proper maintenance of his royal dignity, but for the needs of his government as well. The King was expected to apply to Parliament for financial assistance only when he had to meet extraordinary requirements, such as the expenses of war. It was not till the reign of Charles II, or perhaps till the Revolution, that Parliament succeeded in establishing the principle that money voted for public necessities did not pass into the King's absolute control, but was to be available strictly and exclusively for the purposes for which it had been voted.

Following precedents which go back to 1688, Parliament now, at the beginning of each reign, grants to the King, for his life-time, an annual provision for the "support of his Crown and dignity," which is at his absolute disposal.[1] In exchange for this grant, the King

[1] By an Act passed at the beginning of the present reign, on 3rd August 1910, there is granted to the King the sum of £110,000 a year for their Majesties' "Privy Purse." This is in addition to Parliamentary provision for certain members of the Royal

"places at the disposal of his faithful Commons in Parliament assembled," that is to say, surrenders to the Exchequer, certain hereditary revenues which are deemed to belong rather to the "Crown" than to the King personally. These revenues arise principally from the rents of Crown lands.

§ 6

Mention may be made of one or two other points which illustrate the fact that the original identity of King and Crown has not been wholly obliterated.

The first is found in the law of treason. The crime of high treason, punishable with death, includes (besides a series of offences of a more definitely political character, such as levying war), not only the murder of the King, but also the act of wounding or imprisoning him, and the fact of "imagining" his death, hurt, or confinement; that is to say, the entertainment of an intention, manifested by an overt act, to bring about any of these objects.[1]

In the year 1495, being the eleventh year of Henry the Seventh's reign, a remarkable Statute was passed, which is probably without a parallel in the world. It

Family. The Prince of Wales draws a revenue from the Duchy of Cornwall.

[1] "Everyone commits high treason who forms and displays by any overt act, or by publishing any printing or writing, an intention to kill or destroy the King, or to do him any bodily harm tending to death or destruction, maim, or wounding, imprisonment or restraint."—Stephen's *Digest of the Criminal Law*, Article 52. Sir James Stephen points out that, in the present state of our law, founded as it is upon the Statute of Treasons passed in Edward the Third's reign (1351), the actual murder of the Sovereign is treason only because it is evidence of an intent to murder.

provides, in substance, that "obedience to a King *de facto*, but not *de jure*, shall not expose his adherents to the punishment of treason when the rightful King re-establishes himself." This Statute is relevant to our present subject because it has been said that it "may perhaps be regarded as the earliest recognition to be found in English law of a possible difference between the office and the person of the King."

In several noteworthy respects the "Crown" is placed by the law in a position of privilege or advantage in its relations with the subject. For all practical purposes these privileges are of importance only because the Crown means the Government; but every advantage which the general "Crown Law" gives to the Crown is of necessity also given to the King as a person. Thus the old maxim that the "King can do no wrong," of which the chief practical application is that a private citizen cannot bring an ordinary action at law against the Government, also still carries its original meaning, that no one can sue the King.[1] Still less can the King be prosecuted for an offence. If a subject has a claim to the possession of property, or arising out of contract, against the Sovereign personally, he must proceed, as he would against the official "Crown," by way of "Petition of Right." "And in case (the petition) shall relate to . . . any matter affecting His Majesty in his private capacity . . . the amount to which the suppliant is entitled shall be paid to him out of such funds or moneys as His Majesty shall be graciously pleased to direct to be applied for that purpose."

[1] "Sir John Markham, Chief Justice, said to King Edward the Fourth that the King cannot arrest a man for suspicion of treason or felony, as others of his lieges may; for that if it be a wrong to the party grieved, he can have no remedy."—Case of Prohibitions del Roy.

§ 7

We have now to speak of the part which the King is called upon to take in the actual business of government.

If a somewhat paradoxical phrase may be allowed, the King is the first and highest of the officials of his Crown, and something must be said of the part which he plays, of the official duties which he discharges, and of the influence he exercises. It is not possible to say very much on this subject, because, at any given moment, not very much is known. The relations between the Sovereign and his Ministers are extremely confidential, and outside the small circle of past and present Cabinet Ministers, and a few high officials, there are not many people who know, save in the most general way, what share the King actually takes in the conduct of the government. Such knowledge only becomes available to the rest of the world when a sufficiently long time has passed for the confidential correspondence and memoirs of royal persons and statesmen to be published. The latest information accessible to the public, of at all a definite kind, is that contained in the second series of Queen Victoria's letters, the final volume of which finishes with the year 1885.

§ 8

We know that there is a great deal of public business for the disposal of which the King's own signature is either legally necessary, or demanded by custom.[1] There

[1] The number of papers which Queen Victoria was in the habit of signing herself is said to have been very great. In moving the reply to the King's message informing the House of Commons of

are other acts which the King may or must perform, which do not involve the signature of any document. Orders in Council cannot be passed save in his presence; indeed, except for the purpose of proclaiming a new Sovereign, the Privy Council does not meet, except under his presidency. The appointments of the Lord Chancellor and of the Secretaries of State are personal acts of the King, consisting in the actual handing of the seals of office to the designated Ministers. Similarly, the King may, without signing any document, prorogue and dissolve Parliament by appropriate words spoken from his throne in the House of Lords.

For all public acts of a formal character the King's responsibility is replaced by that of one or more Ministers. Where the act consists in the signature of an operative document, this ministerial responsibility is fixed by a counter-signature.[1] In the case of an Order in Council, it follows from the presence of Ministers at the Council Board. In the case of the appointments made by handing over the seals of office, and of the oral dissolution of Parliament, the responsibility of the Prime Minister is presumably engaged by the mere fact

her death, Mr. Balfour said that, short as was the interval between her last signature and her death, "it was yet long enough to clog and hamper the wheels of administration; and when I saw the accumulating mass of untouched documents which awaited the attention of the Sovereign, I marvelled at the unostentatious patience which for sixty-three years . . . had enabled her to carry on without break or pause her share in the government of this great Empire." Bagehot says: "The House of Commons has inquired into most things, but has never had a committee on 'the Queen.' There is no authentic blue-book to say what she does. Such an investigation cannot take place; but if it could, it would probably save her much vexatious routine, and many toilsome and unnecessary hours."

[1] Save in the case of "full powers" and ratifications of treaties, where the ministerial counter-signature is replaced, it seems, by a separate document advising His Majesty to sign.

of his being in office at the time; but it may be supposed that the King would receive the requisite advice on which to act in the form of a written memorandum.

§ 9

The practical utility of casting upon the Sovereign personally a considerable amount of purely formal business, the signature, as Bagehot says, "of countless formal documents which contain no matter of policy ... which any clerk could sign as well," appears to be twofold. Its value lies in the first place in the mere fact of the added significance which it lends to the acts for which the King's personal co-operation is required. The necessity of obtaining the King's signature possibly serves as a reminder to the responsible Minister and to his department that the appointment of a Recorder or of the Governor of a Crown Colony is not a mere matter of office routine. Then the royal sign manual is, in the eyes of most people, a not unimpressive adornment to a patent or commission; and may well stand in the eyes of the recipient as a symbol of the national character of his perhaps modest trust. In the second place, the practice serves as a sort of subsidiary guarantee that the King shall be kept continually conversant with the current business of Government. It is true that constitutional usage prescribes, so it is believed, an intimacy of association between the Sovereign and his Government which goes far beyond the requirements of formal business. But any tendency to depart from the usage must, apart from such reminders and remonstrances as Queen Victoria used to address to her Ministers, be ultimately checked by the formal requirements of the law.

§ 10

But the greater part of the more important business of Government does not, so far as forms go, necessarily involve in any way the co-operation of the Sovereign. The Cabinet can carry far-reaching legislation through both Houses of Parliament; it can, in effect, commit the nation to war; it can occupy or evacuate territory; embark on grave political prosecutions; rebuke and discredit or applaud and encourage the national representatives abroad; all without any legal necessity for discussion with the King.

But although, so far as the law goes, it would not be impossible for the Cabinet to have little confidential communication with the Sovereign, the usages of the Constitution, so far as they are known to the public, are all the other way. Queen Victoria expected to be informed and consulted about everything of importance projected by her Ministers, whether it was a bill in Parliament, a despatch to an ambassador, or the appointment of a judge, a general, or a dean; and she was vigilant to see to it that this expectation was satisfied, and that she received the information in sufficient time to enable her to express her views before it was too late. A celebrated instance of this vigilance is furnished by the memorandum which the Queen caused Lord John Russell, as Prime Minister, to transmit to Lord Palmerston (then Foreign Secretary) in 1850, in consequence of Lord Palmerston's persistent habit of taking decisive action without any previous consultation with the Queen (or, for that matter, with the Cabinet either).

The Queen, it said, "requires (1) that (Lord Palmerston) will distinctly state what he proposes to do in a given case, in order that the Queen may know as distinctly to what she has given her royal sanction.

(2) Having once given her sanction to a measure, that it be not arbitrarily altered or modified by the Minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that Minister. She expects to be kept informed of what arises between him and the Foreign Ministers before important decisions are taken, based upon that intercourse; to receive the foreign despatches in good time, and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents, before they must be sent off." More than thirty years later, in the period covered by the last published volume of the Queen's letters, we find more than one example of expostulation by the Queen with her Ministers at measures having been decided on without her knowledge.[1]

§ 11

Bagehot has said, in a passage often quoted, that "the Sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. And a King of great sense and sagacity would want no others. . . ."

[1] On 4th July 1882 the Queen telegraphs to Lord Northbrook, the First Lord of the Admiralty, that while she approves of the instructions to Sir B. Seymour to bombard the forts at Alexandria, they ought to have been submitted to her before being sent, as they may lead to hostilities. "I expect this always to be done in future." On 9th December 1883 the Queen writes to tell Lord Granville that she is surprised to learn that Mr. Chamberlain, a member of the Cabinet, has committed himself in public to various measures, including manhood suffrage. On such important matters "the Queen hopes to hear the views of the Government from the Prime Minister." It must be remembered that these reminders were given to a Ministry with which the Queen's sympathies were imperfect.

In the course of a long reign a sagacious King would acquire an experience with which few Ministers could contend. The King could say: "Have you referred to the transactions which happened during such and such an administration? They afford an instructive example of the bad results which are sure to attend the policy which you propose. You did not at that time take so prominent a part in public life as you now do, and it is possible you do not fully remember all the events. I should recommend you to recur to them, and to discuss them with your old colleagues who took part in them." It is a matter of history that during the reign of Queen Victoria the influence exercised by her in the way indicated by Bagehot was very great. In the latter half of her reign she could bring to bear an experience of the highest affairs which was far longer, wider, and greater than that of any of her Ministers. Her sense of the high dignity and responsibility of her position, her conscientious and pertinacious devotion to business, her great interest in men and affairs, her considerable common-sense, gave her an undisputed and indisputable claim to be listened to with more than formal deference. In form, the Ministers advised the Queen; in fact, it was rather the other way about, and the Queen advised the Ministers.[1] The potential influence of the Sovereign is said to have been illustrated even more strongly by

[1] The late Lord Salisbury, speaking of Queen Victoria in the House of Lords, three days after her death, said that while "observing with the most absolute strictness the limits to her action which the Constitution draws," she maintained "a steady and persistent influence on the action of her Ministers in the course of legislation and government which no one could mistake." "She had an extraordinary knowledge of what her people would think. . . . I have said for years that I always thought that when I knew what the Queen thought I knew pretty certainly what view her subjects would take, and especially the middle classes of her subjects." Lord Kimberley, on the same occasion, said, "I

the position which Prince Albert was, at the time of his early death, in process of creating for himself, than by that attained by the Queen. Mr. Disraeli said of him, with some picturesque exaggeration, "With Prince Albert we have buried our Sovereign. This German Prince has governed England for twenty-one years with a wisdom and energy such as none of our Kings have ever shown. . . . If he had outlived some of our 'old stagers,' he would have given us the blessings of absolute government."

There is every reason to believe that the tradition established by Queen Victoria of reconciling continuous and confidential communication between the Sovereign and the Ministers with the political supremacy of the latter has been preserved by her successors. The value of such relationships must obviously depend in a large measure upon many personal factors. If these are favourable, it is easy to believe that Ministers derive much assistance from the fact of having access, in intimate confidence, to the counsels of a personage in so exalted a position as the Sovereign, who possesses as he must do a kind and range of knowledge and means of information different from their own. In its continuity the King's experience resembles that of the permanent Civil Service; in its variety it is unlike that of anyone else.

§ 12

But while the King has a right to know what his Ministers are doing and contemplating, and to be given

remember very well an old chief of mine, a very able man, Lord Clarendon, then the Foreign Minister, saying to me when I was Under-Secretary, after discussing some matter of importance, 'Well, let us have the Queen's opinion. The Queen's opinion is always worth hearing, even if you don't agree with it.'"

adequate opportunity to comment or to expostulate, he is bound in the upshot to take their advice. Where it is necessary for the prosecution of their policy that he should do any act, sign any document, preside over the passing of any Order in Council, make any speech from the throne, it is his constitutional duty to do that act. Conversely, it is his duty to abstain from taking any action in public affairs, such, for example, as writing a letter to, or conducting a political conversation with the head or the ambassador of a foreign State, otherwise than in accordance with the advice of his Ministers, and in the presence of one of them.

But the King has a right of appeal from the advice of a particular Minister to the Cabinet as a whole. "It is well understood," says Lord Morley, "that the Sovereign has a right to demand the opinion of the Cabinet as a court of appeal against the Prime Minister or any other Minister. It is now publicly known, for instance, that in the difficult foreign crisis of 1859-61 despatches were frequently referred back by the Sovereign from the Foreign Secretary and the Prime Minister to the Cabinet as a whole, and were there constantly modified in the sense desired."[1]

§ 13

There are two cases in which it is possibly true that the King may and should, in the present state of our

[1] But the King is not entitled to endeavour to pierce the solidarity of the Cabinet by asking for separate opinions from individual Ministers. George IV tried to do this in 1825, with the object of fixing on Canning the responsibility for the policy of recognising the Spanish Colonies. The Cabinet in reply requested permission to give their answer collectively. See reference to this incident in *Hansard*, Commons Debates, under date 13th May 1879.

constitutional understandings, act otherwise than on the advice of a Minister.[1] Both cases are doubtful. The first has already been mentioned. It is that which arises when a new Government is to be formed, and it is not certain which of the leaders of the party which is coming into office is the obviously proper person to be the new Prime Minister. It has been suggested that even in this case the King ought to be guided by the advice of the outgoing Minister. This is a view which it seems difficult to accept. It is hard to see how it can be the duty of the retiring Prime Minister to take upon himself unasked to decide between rival claimants to the leadership of his opponents. And the responsibility thrown upon the King is purely provisional. If the person first sent for succeeds in forming a Ministry, not only does he thereby assume ministerial responsibility, retrospectively, for the King's choice of himself, but the propriety of that choice is vindicated by the implied acquiescence of the party which is now coming into power, and the Parliament which it commands.

The other case is that of a dissolution of Parliament. Has the King retained, at the present day, a personal discretion to reject the advice of the Prime Minister who asks for a dissolution? As late as 1858 it seems to have been held, though with some hesitation, that the Sovereign still retained a personal discretion to grant or to refuse a dissolution. There is no modern case of a dissolution being so refused; and recent writers of authority hold that according to present constitutional understanding the Sovereign is conclusively guided in

[1] There must, of course, be numerous border-line cases, in which there is room for doubt whether the act of the Sovereign has a political character. In 1879 the Queen rebuked Lord Beaconsfield for permitting her intention of sending her grandsons on a cruise round the world to be discussed in the Cabinet.—Queen Victoria's Letters, Second Series, III, 23.

the exercise of this prerogative by the advice of the Minister. It is, however, to be remarked that the situation created by the existence of three parties in Parliament, no one of which possesses an absolute majority, is a novel one; and it seems possible that the only relevant precedent, that of 1924, might not, on a future occasion, be considered conclusive. It is, at any rate, theoretically possible, for example, that on the Prime Minister, being the leader of a minority party, advising a dissolution, the House of Commons might dissent, and by a majority address the Crown in the opposite sense.

It may also be observed that on two occasions in recent years the Governors-General of Dominions, who may be presumed to have acted in strict accordance with an advised view of their responsibility as the King's immediate representatives, have treated the request of the Dominion Prime Minister for a dissolution as being within their discretion to grant or to refuse.

In any case, the question whether the King ought still to exercise a personal discretion is not the same as the question whether there can be any public act of the Crown for which no Minister is responsible. If the King's refusal of the Prime Minister's request for a dissolution leads to a change of Ministry, the new Minister assumes responsibility for his action. If the Minister who gave the advice acquiesces in its rejection, *cadit quæstio.*

CHAPTER VI

THE CROWN

§ 1

IN early days all the powers of government were centred, as we have already seen, in the man who wore the Crown. In the course of our history those powers have been almost entirely transferred from the King to a complicated impersonal organisation. It would be far from true to think of the transfer of power as having been effected only by fighting. Violence has the same misleading prominence in history that it has in the newspapers. In the establishment of parliamentary government and of the reign of law, the forces of good sense and convenience, and the lessons learned by reasonable men in necessary co-operation for common national ends, have played a far greater part than revolution. But if we look at our history for a moment as the story of a siege laid by the people round the fortress of an autocratic king, we see it as falling into two chapters. In the first of these chapters, which is a long one, we see the people engaged in frontal attacks, carrying one outwork after another, but never succeeding in reaching the citadel. Legislation and taxation are captured for Parliament; judgment is secured for the judges; acts of government have, in many cases, to be sealed by the Chancellor and the Lord Privy Seal. But there still remains a wide range of powers which

the King may exercise at his own discretion and in pursuit of his own plans.

The second chapter, a much shorter one, tells of very different tactics. The popular forces, relinquishing their plan of destroying the royal authority, and adopting a stratagem like that of the Trojan horse, penetrate the citadel itself, and, holding the King in honourable captivity, proceed to govern in his name. Then we witness a curious turning of the tables. The citadel, manned by its new garrison, sets out to reconquer the city and the outworks which it had formerly lost. Legislation and taxation fall once again to be governed by the authority of the Crown; the discretionary powers of government, instead of being reduced, are expanded; territory hitherto long sacred to the courts of law is again invaded.

The influence exercised by Ministers over the proceedings of Parliament has already been referred to in a previous chapter. Our next business is with the powers of the Crown outside Parliament, and, in the following chapter, with the institutions and officers by whom that power is exercised.

§ 2

The uninitiated might perhaps, not inexcusably, imagine that all public power is exercised in England in the name of the Crown and by the servants of the Crown. Nothing could be further from the fact. The Crown has no more a monopoly of authority than it has of property. To the mind of the Middle Ages, indeed, the analogy between public power and property was strong, or rather the distinction was faint. The "franchise" or "liberty" which entitled a baron to hold his own court was part of his estate. It might, no

doubt, have been originally granted by the King; but the title had as effectively passed to the beneficiary, as the ownership of land would pass by a grant of the fee simple. The right of self-government which a borough derived from its charter was not an authority exercised by way of agency from the Crown, but something subtracted and alienated from the King's domain, and recoverable only by due process of law and as a penalty for some act of forfeiture. The justices of the peace, who for centuries were the principal agents of local administration, were not (and are not) servants of the Crown in the sense of being under a duty to take orders from the King. Though appointed and removable by the Crown, their authority is their own, conferred upon them by the very numerous Statutes which they have to apply, and, except by removal from office, they can be controlled only by judicial process. So with the bodies which have now for most purposes replaced the justices as organs of local government, the county and borough councils, and other municipal bodies of all kinds. A striking example of an authority distinct from the Crown is furnished by the East India Company, which, though created by Royal Charter, and exercising on behalf of the Crown some of the highest prerogatives of sovereignty, was not a part of the royal government, so that soldiers and officers of John Company were not in His Majesty's service. The King is the head of the Church and appoints the bishops. But the chaplains to the Forces and to the gaols are perhaps the only clergy of the Established Church who are servants of the Crown.

Trinity House is an ancient corporation which is entrusted with the important public service of maintaining the lighthouses. But it has been explained from the Bench that "The Trinity House is not . . . in the

position of a great Officer of State. . . . All the great Officers of State are . . . emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority."

If the reader will turn over the forty pages or so of *Whitaker's Almanack* which are headed "Government and Public Offices," he will find a very large number of boards, committees, and commissions enumerated there which appear, in form at any rate, to be distinct from the departments of State and to have some sort of autonomy. He will find such bodies on the Board of Customs and Excise, the Board of Inland Revenue, the Charity Commission, the Civil Service Commission, the Commission of Crown Lands, the Central Electricity Board, the Forestry Commission, the B.B.C., the University Grants Committee, the National Savings Committee, the Imperial War Graves' Commission, and so forth. Besides these multifarious organs, which have an obviously national character, there exist many other authorities, quite apart from the county councils and municipalities, whose business is of a local character; such as the "Duchy of Lancaster," the "County Palatine of Durham," the "Port of London Authority," the "Mersey Docks and Harbour Board Trustees," and many scores besides.

In some instances, as for example in the case of the "Duchy of Lancaster," and the "County Palatine of Durham," these bodies owe their existence to purely historical causes. More commonly they represent a policy, namely that of enlisting for the discharge of

public responsibilities the services as commissioners of people of distinction who are not in the service of the Crown. Sometimes, as in the cases of the Board of Inland Revenue and the Board of Customs and Excise, they seem to imply little or no substantial independence of the Crown, but express no more than the intention of the legislator, or of the Crown itself, to emphasise a clearly defined and distinct sphere of government business.

§ 3

In considering the relationship between public authorities in general and the Crown, it must be remembered that the theory of the English Government does not recognise a distinction between public and private law, and makes no use of the notion of the State. The distinction between the Crown and its servants on the one hand, and other entities and persons known to the law on the other, is by no means the same as the distinction between the Government or the State and the rest of mankind. The true conception may perhaps be put this way. The Law is the supreme source of authority, a sort of abstract Sovereign; and while the Crown is, in this respect, the favourite child, and the chief beneficiary, of the law's favours, it is still only one among many depositories or trustees of public power. The Crown is placed by the law in many ways in a position of privilege. It is only in special cases, for example, and by special process, that it is liable to be sued; its servants, when acting in the course of their duties, enjoy a similar (though not the same) immunity; it is not bound by the provisions of Acts of Parliament, unless named expressly or by necessary implication; so that, for example, Crown property is not, in general,

liable for local rates.[1] These privileges are not the privileges of the English State, but only of the Crown; and when the law entrusts a share of public authority to a body other than the Crown, they do not accompany the grant.

As already remarked, some of the nominally autonomous bodies, such as the Revenue Boards, are, subject to the limitations imposed by their statutory duties, in substance departments of the Treasury. The Duchy of Lancaster has a Minister. In the case of some bodies, such as the British Museum (which is governed by a very distinguished body of trustees), the fact of their receiving public money places them, in the same manner as the local government bodies, under some measure of control by the Treasury. There appears to be a tendency for the Treasury control to be extended to the regulations of all matters relating to "establishment"—the conditions of service of the staff—in many public bodies which, in respect of their primary functions, are autonomous.

It is evident, in short, how mistaken it would be to imagine that government is divided into national and local authorities, and that the powers and responsibilities of Ministers of the Crown are defined by this distinction. On the contrary, while on the one hand Ministers have a wide jurisdiction in directing and controlling the machinery of local government, there are, on the other hand, many limitations upon their powers in respect of the agencies of the national administration.

We are concerned in these pages with the Constitution and not with the administrative system; it is consequently impossible to go into detail, and almost equally

[1] But pays them, on the basis of a valuation made by the Treasury. The Crown has numerous other legal privileges besides those mentioned.

so to generalise. It must suffice to say that in so far as, in our very complex arrangements, the Crown has retained or acquired, by the financial assistance it gives or otherwise, any power of regulating or directing the actions of other public authorities, there results from the existence of this power the responsibility of some Minister, and therefore of the Ministry as a whole, to Parliament. It should be added, as an illustration of the elasticity of our system, that some authorities, such as the Ecclesiastical Commissioners and the Forestry Commissioners, are represented in Parliament by Commissioners who have no necessary political connection with the Ministry of the day.

§ 4

The Prerogative

The powers and privileges which the Crown derives from the Common Law, that is to say, from the ancient custom of the Kingdom, constitute, taken together, the Prerogative. The processes by which it was settled that the Prerogative is derived from and defined by the law, and by which it was gradually cut down to its present limits, make up a great part of our constitutional history. Owing to the facts that the Common Law prerogatives are nowadays cast into the shade by the powers which the Crown derives from parliamentary enactment, and that both classes of power are alike exercised by responsible Ministers, the distinction is chiefly of interest to historians and to lawyers. Nevertheless it cannot be passed by without comment.

The prerogatives of our early kings, though far from giving them the autocratic power of an Oriental despot, and limited as they were in the legal conscience of the age, by the laws of religion, the privileges of the Church,

and the rights derived from the feudal system, were yet wide. And the fragments which have survived the establishment of parliamentary control over legislation and taxation, and the confirmation to the judges of a monopoly of the judicial power, are by no means trifling. In a passage often quoted, Bagehot enumerates some of the things which Queen Victoria could have done without consulting Parliament. The list applies equally to our present Sovereign and his Ministers. "Not to mention other things, she could disband the Army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General-Commanding-in-Chief downwards; she could dismiss all the sailors, too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders."

It is impossible to draw up a list of the prerogatives of the Crown. They were once numerous; some have been abrogated by Statute; some have no less certainly been lost by disuse; the existence and limits of others raise difficult questions of constitutional law. Indeed, it is from its obscurity that the Prerogative derives much of the importance which it still preserves. This somewhat dark saying calls for explanation. When Ministers are minded to use the authority of the Crown for a purpose of policy, they in general either find that they already undoubtedly possess the necessary powers, or else they forthwith apply to Parliament, with every prospect of success, for the necessary enactment. Apart

from the cases where the Prerogative is indisputable, Ministers are apt to fall back upon it chiefly in cases where an application to the legislature is not thought desirable, perhaps because of the anticipated opposition, or because the contingency has been unforeseen, or legislation is deemed unsuitable because the matter in hand is not of sufficient general importance. The sphere of the Prerogative which is brought into question in this way is that of the less clearly defined part of the royal power, and as such is that which most frequently gives rise to controversy and litigation on constitutional issues. Here are some modern examples:—

Dr. Colenso's case: In 1863 Dr. Colenso, the Bishop of Natal, was tried for heresy and deposed from his See by the Bishop of Cape Town, as Metropolitan. The Bishop of Cape Town purported to act under authority conferred upon him by an exercise of the Prerogative in the form of letters patent. Dr. Colenso appealed to judicial committee of the Privy Council, which reported, on two grounds, both of which are instructive, that the Prerogative had been overstepped. The Lord Chancellor pointed out in the first place that "after the establishment of an independent Legislature in the Cape of Good Hope and Natal there was no longer power in the Crown by virtue of its Prerogative to establish a Metropolitan See or Province, or to create an ecclesiastical corporation whose status, rights and authority the Colony could be required to recognise"; and secondly, that while "it is a settled constitutional principle or rule of law that . . . the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law."

The Wensleydale Peerage: In 1856 Ministers, wishing to increase the number of peers qualified to hear judicial appeals, and relying upon the supposed Prerogative of the Crown, advised the Queen to issue letters patent to an eminent judge, Sir James Parke, creating him Baron Wensleydale, but for life only. The right of the Crown to create a peerage which was not heritable was challenged, and the question was referred to the Committee of Privileges, which advised that the Patent availed only to create a title of honour, and not to give a right to be summoned to sit and vote as a peer. It was not disputed that in former times the Crown had created life-peers; but it was held that since the Prerogative had not been so exercised for more than four hundred years, it must be held to have lapsed. "The Ministers, relying upon the maxim '*Nullum tempus occurrit regi*,' argued that there could be no loss of Prerogative by lapse of time. But their opponents forcibly contended that the Crown could not alter the settled constitution of the realm."[1]

The case of the *Zamora* (1916): During the Great War a Swedish, and therefore neutral ship, the *Zamora*, was brought into Barrow-in-Furness by a British cruiser to be searched. It was found that part of her cargo consisted of copper, a metal of great importance

[1] Bagehot, speaking of this case, says: "A few years ago the Queen very wisely attempted to make life-peers, and the House of Lords, very unwisely, and contrary to its own best interests, refused to admit her claim. They said her power had decayed into non-existence; she once had it, they allowed, but it had ceased by long disuse. . . . There is no authentic explicit information as to what the Queen can do, any more than of what she does." Twenty years later, by the Appellate Jurisdiction Act (1876) the Crown attained its object, being authorised to create four judicial life peerages, a number increased in 1913 to six.

to both belligerents; and the consignment was requisitioned by the War Office under powers given by Order in Council to the Prize Court. The Judicial Committee of the Privy Council decided that the Prerogative did not extend to empowering the Crown to override the principles of International Law which the Prize Court existed to administer.[1]

The case of the Wilts United Dairies (1921): This was a case on prerogative taxation, a subject which it is strange to find still alive. During the War an official was created with the title of Food Controller, who was empowered by Statutory Order to make such regulations as seemed to him expedient for the purpose of encouraging or maintaining the food supply of the country. In the exercise of his powers the Controller made an order prohibiting, unless under licence, the purchase of milk in the four westernmost counties. The Wilts United Dairy Company having applied for licences, the Controller granted them on the condition, accepted by the Company, that the latter should pay twopence for every gallon of milk purchased. The company having failed to pay, the Attorney-General filed an information against them, on the hearing of which the Court of Appeal held that in the absence of express Statutory authority, which did not exist in this case, the Crown had no power, and its officer had no

[1] Lord Parker said: "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of Law in this country is out of harmony with the principles of our Constitution. It is true that under a number of modern Statutes various branches of the Executive have power to make rules having the force of Statutes, but all such rules derive their validity from the Statute which creates the power, and not from the executive body by which they are made."

power on its behalf, to levy money. "It makes no difference," said Lord Justice Atkin, "that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement."

The case of De Keyser's Hotel (1920) turned largely on the important question whether, when the Crown is invested with Statutory powers covering the same ground as a Prerogative, it can, nevertheless, if it finds it convenient to do so, elect to rely on the Prerogative. The answer is in the negative. In 1916 the War Office requisitioned the above-mentioned hotel for the purpose of housing part of its staff. A dispute having arisen as to the compensation payable, litigation took place over the question whether the Crown had taken the premises under the Prerogative, or under the Statutory powers conferred by the Defence of the Realm Act. In the former case compensation was a matter of grace; in the latter, it was a matter of right, and the amount fell to be assessed by a jury. The House of Lords decided that the hotel had in fact been taken under the Statutory powers; but went on to say that when the legislator had given the Crown powers which render the exercise of the prerogative unnecessary, there is a presumption, and perhaps more, that the Crown has acted under its parliamentary powers, even when its interest is otherwise.

The undoubted prerogatives include such familiar examples as the power to summon, to prorogue and to dissolve Parliament; the power to do all acts of an international character, such as to declare war or neutrality, to make and to denounce treaties, to establish or break off diplomatic relations, to proclaim a blockade, or to

establish a protectorate; the power to make peers and to create and appoint to other titles of honour; the power of appointment to a large number of public offices; the power (in general) to dismiss the servants of the Crown, and to regulate the conditions of their service;[1] and the power to pardon offenders.

With regard to the treaty-making power, it is to be noticed in the first place that there is now a sufficiently well-established constitutional understanding that no treaty will be ratified by the Crown without previous parliamentary discussion; and in the second place that a treaty, standing by itself, cannot impose a charge upon the people, or effect a change in the law of the land. The treaties of peace which concluded the late War contained, among other things, provisions setting up courts of arbitration to adjudicate on private claims between citizens of the lately belligerent countries in substitution for the ordinary courts of law. For this, among other reasons, it was necessary to pass Acts of Parliament to invest the treaties with legal authority.

As to the prerogative of pardon, the principle is that the Crown has power, on the advice of the Home Secretary, to pardon all offenders against the law, whether before or after conviction. To this principle there are, however, important exceptions. In the first place the King can only absolve offenders against the criminal law; he can only avert punishment; he cannot interfere with the course of civil proceedings, the object of which is to obtain for the injured party damages or the restitution of property, or some similar relief. This

[1] It seems, however, that, except in the cases (such as those of the judges of the High Court, and of the Comptroller and Auditor-General), of offices which, by Statute, are held "during good behaviour," it is not open to the Crown to sign away its right to dismiss its servants "at pleasure."

distinction is applied in the case of persons committed to prison for contempt of Court. Where a person has been sent to prison by a judge as a punishment for an act of disobedience to the order of the Court, he can be pardoned; not so, on the other hand, where the purpose of the commitment is to coerce a recalcitrant party to obedience. A pardon in this case would imperil the right which the judge is seeking to enforce. Secondly, by the Act of Settlement (1701), a pardon cannot be pleaded as an answer to an impeachment, though the Crown remains free to pardon after the Bill has been passed; and by Section 12 of the Habeas Corpus Act (1679) offenders who have incurred the penalties provided thereby (the "penalties of Premunire") are declared to be "incapable of any pardon from the King."

It hardly seems necessary to add that the Crown cannot pardon an offence which has not yet been committed. This was sometimes done in the Middle Ages; but, apart from other objections, would now fall under the provision of the Bill of Rights (1689) "that the pretended power of dispensing with laws and the execution of laws by Royal Authoritie as it hath been assumed and exercised of late is illegal."

The Crown has, of course, lost for almost all purposes what was formerly an important Prerogative, namely, that of legislation by means of proclamation or ordinance issued by the King in Council. The law on the subject was laid down in 1610 by Sir Edward Coke and three others of the judges, who were consulted by the King as to whether he could "by his proclamation prohibit new buildings in and about London," or "prohibit the making of starch of wheat." The judges replied that "the King by his proclamation or other ways cannot change any part of the Common Law or Statute Law,

or the customs of the realm . . . or create any offence which was not an offence before." The effective abrogation of this ancient and somewhat undefined Prerogative resulted from the abolition in 1641 of the Court of Star Chamber, where infringements of royal ordinances were punished. Since that time there have been few instances of illegal proclamations. But in 1766 an Act of Indemnity was passed to give retrospective validity to an Order in Council issued in the previous year by which, at a time when Parliament was not sitting, an embargo was laid on ships leaving England with wheat or wheat flour. And on the eve of the Great War, on 2nd August 1914, a Royal Proclamation established a moratorium of one month for bills of exchange. This was substantive legislation, by a non-existent Prerogative, and had to be confirmed by an Act of Parliament which was passed the next day.

An unmistakable trace of the Prerogative of legislation still survives in the power of the Crown to create a corporation, that is to say, to invest an association or class of people with a permanent legal personality, similar to that possessed by a commercial company. This prerogative is exercised not by proclamation or ordinance, but by the grant of a charter. Though corporations are nowadays usually created either directly or indirectly by the authority of an Act of Parliament, the Prerogative is sometimes used for such purposes as the incorporation of a "chartered company," a college, or a learned society. The power of creating a municipal corporation by an exercise of the Prerogative was last resorted to by Charles II in 1677, in favour of the borough of Newark.

An ancient Prerogative now in abeyance is that of pressing men for the King's service. In the Middle Ages this power had a wide range, and it is recorded

that Windsor Castle and St. Stephen's Chapel, the ancient home of the House of Commons, were both built by pressed men.[1] Soldiers were pressed for foreign service by Queen Elizabeth in the year of the Armada; but an Act of the Long Parliament (16 Charles I, c. 28) recites that "by the laws of this realm none of His Majesty's subjects ought to be impressed or compelled to go out of his country to serve as a soldier in the wars, except in case of necessity of the sudden coming in of strange enemies into the Kingdom, or except they be otherwise bound by the tenure of their lands or possessions." It is very different for the Navy. The prerogative of the Crown to conscript marines and watermen for the Navy is "supported by the continued usage of centuries, by express and by the implied sanction of numerous Statutes" which have limited and defined the right.[2] The Crimean War is said to have been the first great war in which the Crown made no use of this power. The power to impress sailors is no longer inserted in the patents creating the Admiralty Board.

§ 5

Acts of State

It is important to notice that no act of the Crown can be brought within the Prerogative merely on the

[1] In Henry VI's reign minstrels were pressed *in solatium regis*.

[2] At the Abingdon election in 1698, one William Hucks, the unsuccessful candidate, promised the electors *inter alia* that if he were elected the Lords of the Admiralty would protect the Abingdon watermen and bargemen from being pressed for the Navy. This coming to the knowledge of the House of Commons, Hucks was reprimanded and committed to the custody of the Sergeant-at-Arms.—Porrit, *The Unreformed House of Commons*.

ground that it is justified by public necessity. In Lord Camden's words, "With respect to the argument of State necessity . . . the Common Law does not understand that kind of reasoning." It is for this reason that when Martial Law has been proclaimed—a proclamation which does not in any way alter the law of the land—or when, as during the late war, it is not improbable that acts, strictly speaking illegal, may have been committed in good faith in the public interest, it is customary to apply to Parliament to pass an Act of Indemnity. But the limitations imposed by law upon the Prerogative powers of the Crown operate only in the relations between the King and his subjects, or foreigners within his protection. "Prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him." An act done by the Crown outside the range of English (or British) law is said to be an Act of State. Of this kind of action the principal examples are furnished by acts of war. For an act to have this character it is, of course, not necessary that it should be done outside His Majesty's dominions—it may be done in repelling an invasion. And for this purpose there is no distinction between an act of regular war and any other act of deliberate public violence, such as the bombardment of Copenhagen in 1807 or that of the Alexandria forts in 1882; the necessary conditions are that the act shall have been done outside the limits of the King's peace, and have been either previously ordered or subsequently adopted by the Crown. The unchallengeable authority of the Crown, outside the Prerogative, extends also to determining the relations of this country to others, and (in principle) to fixing the territorial limits of the King's dominions.

§ 6

Statutory Powers

The powers which the Crown derives, not from the prerogative, but from Acts of Parliament, are various, wide, and growing—all in a superlative degree. They include not only the greater part of the powers under which the central departments of Government do their direct business, such as managing the Army, the Navy, the Post Office, etc.; but also the powers, certainly no less important, by which Whitehall—the Treasury, the Ministry of Health, the Board of Education, and so forth—controls the action of the local government authorities and other bodies distinct from the Crown.

A marked feature of our modern method of government is the extent to which Parliament is nowadays in the habit of entrusting Ministers of the Crown with the power of making rules, having the force of law, for the purpose of filling in the details of Statutes, and even of extending their scope. Substantial as is the annual output of Statute Law, it is far exceeded in bulk by that of the "Statutory Rules and Orders."

Normally the rule-making power is confined to the purpose of elaborating the details of administrative machinery. In some recent instances, however, it has gone much further, and has empowered the Crown to amend, in the light of experience, the substantive provisions of the principal Statute. Thus it is provided by Section 67 (1) of the Rating and Valuation Act, 1925, that "if any difficulty arises in connection with the application of this Act . . . the Minister may by Order remove the difficulty . . . and any such Order may modify the provisions of this Act so far as may

appear to the Minister necessary or expedient for carrying the Order into effect."

It is obvious that this system involves the transfer of a large part of the effective power of legislation from Parliament to the government offices. The principal explanation of this development lies, of course, chiefly in the great amount, and in the highly elaborate and technical character, of the legislation which modern policies and standards of government call for. Another partial explanation has been suggested by Sir Josiah Stamp. "If a general principle has been carried by a majority of the House after strong opposition, and, perhaps, prognostication of failure, it is obvious that concrete instances of practical difficulty would relight all the fires of controversy with a chorus of, 'I told you so.' The simple application of the principle upon which the majority had agreed, in some local area or at some particular emergency, might raise over and over again in acute form all the heated arguments that attended the official debate, and thus make administration on judicial and uniform lines impossible."

In many cases the Statute which confers the subordinate legislative power upon a Minister or Department of State requires the draft Order or regulations to be laid before both Houses of Parliament for a certain length of time before they can take effect. In other cases the draft rules require, before they come into force, to be confirmed by resolutions of both Houses. In both cases the provision is designed to enable Parliament to exercise a veto. It seems, however, that as a matter of practical experience no use is made of these opportunities of exercising a critical control over departmental legislature, and that the theoretical check which Parliament has in form reserved to itself is illusory.

§ 7

Language is sometimes used which implies the idea that an effective power of controlling the exercise of legislative power by bodies subordinate to Parliament resides in the Courts of Justice. A vague memory that the judges in the past have played a conspicuous part in checking the Prerogative suggests the notion that they may have a similar role to play in regard to the powers which the Crown derives from Statute. It is true that a Court of Law has the power and the duty to refuse to give effect to an Order in Council or other administrative regulation which the Crown had, in fact, no power to make: such an order would be said to be *ultra vires*. But the judges have naturally no power to consider in any way the merits of the regulation before them; and modern parliamentary draftsmen use language of such boldness that it is increasingly improbable that departments will be found to have exceeded their Statutory powers. A formula which is coming into favour prescribes that "any such regulations shall have effect as if enacted in this Act"; and the judges have held that the effect of these or similar words is to invest any regulation made thereunder with the sovereign character of an Act of Parliament.

§ 8

There is a marked tendency in our more modern legislation for the Crown to procure for itself, or for other public bodies, not only powers of a legislative nature, but also powers hardly distinguishable from those normally exercised by Courts of Law; namely, powers of adjudication in cases of conflict between the authority of government and the rights or interests of citizens. Many examples could be given of this conspicuous trend, but the following will suffice: By the

Housing and Town Planning Act (1909) it is provided that the power to enforce the closing of premises, which had previously lain with the magistrates, with an appeal to Quarter Sessions, should be entrusted to the local authority, with appeal to the Local Government Board. Any order made by the Board on such an appeal was declared to be binding and conclusive on all parties.

Under the Statutes relating to Patents, Designs, and Trade-marks, complaints that a patent has been refused or has been revoked contrary to law are heard in the first place by an administrative official, the Comptroller-General, and in appeal by a second administrative official, the Solicitor-General. By Section 75 of the Act of 1907 the Comptroller-General is empowered to refuse to grant a patent of which the use would, in his opinion, be contrary to law *or morality*.

Where provisions such as these are in operation, the Courts of Law will only interfere to preserve respect for certain fundamental conditions of justice, such as that both sides shall be heard, and that the adjudicator shall not be personally interested in the results.

It would take us too far afield to discuss the causes of the tendency in question. The expense and delays of regular litigation offer a partial explanation. But more fundamental is the swing of the pendulum towards the pole of policy, in that oscillation between policy and law which seems to be inseparable from social progress. Meanwhile, in the opinion of many, it is to be wished that it should be more clearly and generally recognised that we are committed to a system of administrative law and administrative tribunals, and that reform should follow the direction, not of an impossible reaction, but of developing these nascent institutions on the lines of greater publicity and greater uniformity.

CHAPTER VII

COUNCILS AND OFFICERS

IN this chapter we shall speak of the machinery by which the powers of the Crown are exercised; first, that ancient and dignified body, the Privy Council; secondly, that modern and all-powerful committee, the Cabinet; and thirdly, the Civil Service.

§ 1

The Privy Council, in its origin, was a panel of varying numbers of men of rank and distinction who were the King's permanent advisers for the various branches of his Government. Like other bodies, ancient and modern, to which great prestige has attached, it had a constant tendency to grow too large, with the result that it had to be broken up into sections or committees. One of these committees formed the Court of Star Chamber of evil fame. Another, the Committee of State, which we first meet with in the reign of Edward VI, was a predecessor of the Cabinet. At the present day the Privy Council is composed of about 330 gentlemen and one lady.[1] It includes all Cabinet Ministers, past and present, the Prince of Wales and the Royal Dukes, the Archbishop of Canterbury, the Bishop of London, and a large number of other people of distinction, such as the Speaker, the Lord Chairman of

[1] The Minister of Labour, not the Queen.

Committees, the Viceroy of India, the Governor-General of Australia, the Lords of Appeal, the Lord Chief Justice, the Lord Justices, and retired High Court Judges and Ambassadors.

Privy Councillors are appointed with no other formality than a declaration of the King in Council, coupled with the entry of their name in the record. The Council has a "Lord President" who is invariably a Cabinet Minister, and as such changes with a change of Government.[1] Certain offices carry with them a constitutional claim to a seat in the Privy Council; a Cabinet Minister is always called to the Council Board, also the Lord Chief Justice, the Lord Justices, the Archbishops, and the Bishop of London. The King's sons are Privy Councillors by birth, during their father's lifetime, and do not need to be sworn. Other Councillors on their appointment take the Oath of Allegiance, and a special Privy Councillor's oath, promising fidelity and secrecy. Admission to the Council is the only formality necessary for becoming a Cabinet Minister. Privy Councillors are put in the Commission of the Peace for every county, which means that they have the powers of a justice of the peace for all parts of the country. They also have an ancient right to be present in the House of Lords during its sittings, a privilege which is an interesting reminder of "the fact that the House of Lords is the ancient Parliament chamber of a great Council which comprised other elements than the peers."[2] There is

[1] A foreigner might be excused for supposing that the President of the Council is "Président du Conseil," in other words Prime Minister. This is not the case. In Mr. Baldwin's Ministry the Presidency was held by Lord Balfour; in Mr. Macdonald's it is held by Lord Parmoor.

[2] The right of Privy Councillors who were not peers to vote in the Lords was taken away by a Statute of Henry VIII.—(31 Henry VIII, c. 10.)

only one occasion on which the Privy Council meets as a whole, namely on the death of the Sovereign. Then it assembles, together with "the Lords Spiritual and Temporal of this realm" and "numbers of other principal gentlemen of quality" (including the Lord Mayor and the Aldermen of London) to proclaim the successor.

But though meetings of the Council to which all the members are summoned are confined to this one solemn occasion, ordinary meetings are common, as they are necessary for the passing of Orders in Council and Proclamations. For meetings of the Council there are two people whose presence is indispensable: the King and the Clerk. Without the King there is no Council, at the most a Committee thereof; and without the Clerk to record and sign the proceedings its transactions could not be legally proved. According to old usage the quorum is three; but in practice about six Councillors are summoned, of whom several are members of the existing Cabinet. Their attendance is needed in order to cover the business done with Ministerial responsibility. Unlike the Cabinet, the Privy Council is not a deliberative body; it is strictly executive, and meets solely to give formally authoritative sanction to measures previously planned by Ministers and, if sufficiently important, debated in Cabinet. The Privy Council also serves, as in ancient times, as a panel for the composition of Committees. Of the Committee of the Council some, such as the Board of Trade, are merely names for Government departments, and never, in fact, meet. Two only are true deliberative bodies and really assemble for purposes of discussion—the Cabinet (if, indeed, it is, properly speaking, a Committee of the Council), and the Judicial Committee. The Judicial Committee of the Privy

Council is composed exclusively of judges, including former Lord Chancellors, and serves as the Supreme Court of Appeal for the Empire, apart from the United Kingdom.

§ 2

Politically, the Cabinet is the most important body in the country; legally, it has no existence. Unlike the French "Conseil des Ministres," the formal consent of which is required by law for certain measures, the Cabinet, so far as the law of England is concerned, might never meet. No rules of law prescribe who shall be admitted to membership, what business shall be laid before it, or what the quorum shall be. So far as any rules govern these matters, they are rules of custom, and are subject to the discretion of the Prime Minister. Indeed, so sedulously has the Cabinet been protected from being entangled in the meshes of the law, that it is even doubtful whether it can properly be described as a Committee of the Privy Council. It is true that it is composed exclusively of Privy Councillors; but it is not appointed by or in pursuance of any Order in Council; and it is entitled to keep its proceedings secret not only from the Council—that is natural—but even, so it must seem, from the King himself.

Before the War no systematic records were kept of what passed in Cabinet, and it was even regarded as improper for a member to take notes of its proceedings. The theory apparently was that the existence of minutes of debate which could be subsequently quoted would have the effect of imposing an undesirable check upon the freedom of Ministers to change their minds in response to argument, or to acquiesce in policies of which they might originally have expressed disapproval.

Now, however, the Cabinet has a Secretary, whose duty it is to prepare its business and to record its decisions and transmit them to the proper quarter. An instructive light is thrown upon the importance of those duties by a passage in Sir Thomas Heath's recent book on the Treasury. "In former days, before the proceedings of the Cabinet were systematised as the result of the establishment of a Secretariat to prepare material for their consideration, and to record and make known to the proper departments and persons the decisions arrived at, it was possible, on occasion, in large measure to 'short-circuit' the Treasury and to confront them in a particular case with *un fait accompli*. To meet the danger of a proposal with large financial consequences being thus passed without any opportunity being afforded to the financial Department of Government of offering criticisms or observations beforehand, definite instructions have now been circulated to the Departments on the authority of H.M. Government. It has become the common practice in these days of Cabinets numerically large, to refer large questions in the first instance to Committees of the Cabinet, who report upon them before the Cabinet as a whole is invited to take a decision. Notwithstanding that he is generally not a member of the Cabinet, the Financial Secretary to the Treasury is often a member of such Committees of the Cabinet, and this is a means of securing touch between the Treasury and the Committees. But whether this is so in a particular case or not, it is clear that, if the finances of the country are to be kept on a sound basis, it is essential that the financial bearings of all questions of policy should be comprehensively examined in advance between the Treasury and the departments concerned. . . . Accordingly, it has been definitely laid down by circular that any proposal involving the

taxpayers' money, whether in the form of direct expenditure, or of Government guarantees or otherwise, will only be admitted for decision (one way or the other) by the Cabinet after it has been examined in all its bearings between the Treasury and the department from which the proposal emanates. By a more recent circular (28th April 1924), the procedure has been still more strictly prescribed, and the provision made that other departments which may be concerned, and also (where contentious Bills are involved) the Law Officers, shall be associated in the preliminary consideration of each proposal. The circular prescribes that all memoranda, draft bills and other constituents of agenda must be sent to the Cabinet Secretariat for circulation only *after* their subject-matter has been fully examined between the departments from which they emanate, the Law Officers whose contentious bills are involved, and any other departments concerned; and these documents must bear on the face of them a specific statement that this examination has taken place. . . . To enable the members of the Cabinet . . . to have time to consider proposals intended for Cabinet decision, and in view also of the possibility that such inter-departmental examination may result in definite differences of opinion necessitating the preparation of further memoranda by the dissenting department or departments, no memoranda, draft bills, etc., which originate proposals for Cabinet decision may be placed on the agenda until an interval of at least five days has elapsed after circulation, except on any occasion when the Prime Minister expressly authorises a relaxation of the rule."

This information is of interest. So far as forms go, all we learn is that suitable arrangements have been made to ensure that in a certain class of government business certain permanent officials shall have the

opportunity of submitting their views to Ministers before they advise His Majesty to authorise proposals being made to the omnipotent arbiter, Parliament. In reality, the type of business referred to includes, with the exception of foreign affairs and matters of detail and routine, almost the whole business of government. And what the Cabinet will decide is going to be done. The bills are going to become laws, the expenditure authorised, the taxes levied. In other words, we are here at the real heart of government. And we notice two things. In the first place, owing to the complexity and technicality of the business to be done—doubtless also owing to the personal authority of the officials concerned—government is coming to be conducted as a debate between the great departments of State; and they have found it necessary, and have been able, to insist on a more direct and effective hearing in Council than could be ensured for them by their respective Ministers. And in the second place we see that, just as Parliament, three centuries ago, signified and secured its claim to primacy by elaborating rules of procedure to guarantee fair and sufficient discussion, so to-day a new machinery of government signifies its claims by establishing rules of procedure having the same objects.

§ 3

In recent times the Cabinet has come to include about twenty members, all of whom belong to one or other House of Parliament, and, as we have said, to the Privy Council. The holders of certain offices are always included, namely, first, of course, the Prime Minister, who is generally the First Lord of the Treasury; then the Lord Chancellor, the Chancellor of the Exchequer, the Lord President, the Lord Privy Seal, the Secretaries

of State (of whom there are now seven), and the First Lord of the Admiralty.

The present Cabinet (September 1929) includes, in addition, the following: the Presidents of the Board of Trade and of the Board of Education, the Ministers of Health, Agriculture and Fisheries, and Labour, and the First Commissioner of Works, thus making nineteen Cabinet Ministers in all.[1]

Perhaps the most important Minister who is not always admitted to the Cabinet is the Attorney-General. As the Cabinet can look to the Lord Chancellor for legal advice, the presence of the Attorney-General is not necessary for this purpose; and according to the older usage he is not included. Exceptions have, however, been made in recent Cabinets, and in Mr. Baldwin's last Ministry both Sir Douglas Hogg and his successor were included.

It may be taken to be an established rule that, with the exception of the Lord Chancellor, no judge can properly be a Cabinet Minister. This rule was broken in 1757 in the case of the great Lord Mansfield, the Lord Chief Justice, and again in 1806, when Lord Ellenborough, holding the same office, was included in Granville's Cabinet. Both appointments were criticised and there has been so subsequent example.[2]

[1] Mr. Ramsay Macdonald's previous Cabinet included the same officers, with two in addition, namely the Postmaster-General and the Chancellor of the Duchy of Lancaster. But as the Prime Minister was both First Lord of the Treasury and Secretary of State for Foreign Affairs, the total number in Cabinet was twenty. Mr. Baldwin's last Cabinet was constituted like that now in office, with the addition of the Chancellor of the Duchy of Lancaster and the Attorney-General, twenty-one in all.

[2] "On the dismissal of Mr. Legge, Lord Mansfield actually became Chancellor of the Exchequer. This was according to ancient usage by which, on the vacancy of this office, the seals of it are delivered to the Chief Justice of the King's Bench for the

§ 4

If we take the "Departments of State" as being those government offices which are presided over by Ministers, we find them to be twenty in number, as follows:[1]

The Treasury (The Chancellor of the Exchequer).
The Home Office (a Secretary of State).
The Foreign Office " "
The Dominions and Colonial Office " "
The War Office " "
The Air Ministry " "
The India Office " "
The Scottish Office " "
The Admiralty (The First Lord).
The Board of Trade (The President).
The Board of Education "
The Ministry of Health (The Minister).

time being, who does formal acts till a successor is appointed. Such a provisional arrangement had not previously lasted more than a few days; but Lord Mansfield continued nominally Finance Minister for three months, and speculations began to be formed how, being a peer, he was to open the Budget. . . . At last the new Administration was installed, and Lord Mansfield surrendered back to Mr. Legge the seals of Chancellor of the Exchequer. But instead of returning as he ought to have done, to the exclusive discharge of his judicial duties, he unhappily assumed the character of a political judge by becoming a member of the Cabinet. . . . All parties in the State being united, no opposition was made to an arrangement by which a Criminal Judge was to direct that prosecutions for treason, sedition, afterwards to come before him as a judge, should be instituted. . . . Although this arrangement was cited as a precedent when Lord Chief Justice Ellenborough was introduced into the Cabinet by a Whig Government in the year 1806, I must express a clear opinion that it was unconstitutional, and a strong hope that it will never again be attempted."—Campbell, *Lives of the Chief Justices*, II, 448, 450.

[1] Opposite each office is given the title of the Minister in charge.

The Ministry of Agriculture (The Minister).
The Ministry of Labour ,,
Commissioners of Works (The First Commissioner).

The Ministers of these fifteen offices, as we have seen, are in the Cabinet. The following five departments are not directly represented in the Cabinet:—

The Ministry of Transport (The Minister).
The Duchy of Lancaster (The Chancellor).
The General Post Office (The Postmaster-General).
The Ministry of Pensions (The Minister).
The Office of the Paymaster-General.

In addition to the fifteen Ministers who are heads of departments, the Cabinet, as previously stated, includes three, namely, the First Lord of the Treasury (the Prime Minister), the Lord President, and the Lord Privy Seal, who have no specific departmental duties; and one, the Lord Chancellor, whose duties, though they are numerous and specific, are not usually regarded as departmental.

The terms "Minister" and "Ministry" are used somewhat ambiguously. In a broad sense, every officer of State who comes in and goes out with the Cabinet is said to be in the Ministry; in the narrower sense only those are said to be Ministers who have no departmental superiors. In the narrower sense there remain to be mentioned the Attorney-General, and we should probably add the Solicitor-General, and the Lord Advocate and Solicitor-General for Scotland. In the broader sense, the Ministry further includes eight Under-Secretaries of State, an Assistant Postmaster-General, a Civil Lord of the Admiralty, twelve Financial and Parliamentary Secretaries, five "Junior Lords" of the Treasury, and three officers of His Majesty's Household.

§ 5

It will be enough for our purpose to explain the duties of the two or three most important Ministers and departments.

The position of the Prime Minister has been sufficiently discussed in a previous chapter.

"The greatest political dignitary in the British Government, the one endowed by law with the most exalted and the most diverse functions, the only great officer of State who has retained his ancient rights, the man who defies the doctrine of the separation of powers more than any other personage on earth, is the Lord Chancellor.[1]

In addition to being in the Cabinet, of which he is the legal adviser, and not uncommonly one of the two or three most influential members, the Lord Chancellor discharges the following, among other, duties: He is the Speaker of the House of Lords, where, in addition to his duties as chairman, he often has to take charge of Government Bills; he presides over the House of Lords when it is sitting as the Supreme Court of Appeal; he presides, whenever possible, over one of the divisions of the Judicial Committee of the Privy Council; he has,

[1] Lowell.—"The great office of Chancellor dates back in our history to the reign of Edward the Confessor. He was the chief of the King's secretaries, the chief of the King's chaplains, and the custodian of the royal seal. Edward the Confessor was the first King who used the Norman practice of sealing, instead of signing, documents to which he was a party, and the Chancellor is thus specially associated with the seal." Anson.—The title is said to be derived from the head of the Carolingian chancery in France. The name is traced back to the "cancellarius," a petty officer under the Roman Empire, who was stationed at the bar or lattice (cancelli) of a law court and acted as usher.—*Enc. Brit.* "Diplomatic."

in effect, the duty of appointing to all the higher and most of the lower judicial offices, including the justices of the peace;[1] by Statute he has responsibilities in respect of the Land Registry, of the Public Trustee's office, and of lunatics, from whom he receives a considerable correspondence; he is the patron of 12 canonries and some 700 benefices, of which about one a week falls to be filled; and, finally, the Lord Chancellor is the keeper of the Great Seal.[2]

It is not surprising to learn that "successive holders of this office have testified that it is beyond the strength of any one man to perform the work that ought to be done"; and it may reasonably be conjectured that the overwork of the Chancellor is one of the causes of the lethargic flow of the current of legal reform.

It has been proposed from time to time during the last century that the duties of the Chancellor should be divided. The most recent proposal in this sense was that made by Lord Haldane's "Machinery of Government" Committee. It came briefly to this: that the Chancellor should cease to be Speaker of the House of Lords, and should hand over to a Minister of Justice all his present administrative duties. He should continue to be the principal legal adviser to Government, to be President of the highest Courts, and to be responsible for judicial appointments. He would also be Minister

[1] Before 1909, Justices of peace were appointed by the Chancellor on the recommendation of the Lords Lieutenant. On the advice of a Commission which reported in 1911, local advisory committees have been appointed all over the country, some 300 in number, to inform and advise the Lord Chancellor and the Lords Lieutenant in the selection of justices.

[2] "The Great Seal, in the eyes of English lawyers, has a sort of mysterious efficacy, and passes for the depository of royal authority in a higher degree than the person of the King."—Hallam.

for legislation. The newly-created Minister of Justice would take over, in addition to the administrative duties of the Chancellor, the greater part of the business at present transacted by the Home Secretary, particularly police, prisons, and pardons.

§ 6

If the Lord Chancellor is, after the Prime Minister, the most exalted officer of State, the most exalted department is the Treasury. Its duties are no less multifarious than those of the Chancellor; but it seems better equipped to discharge them. The Treasury may be compared to the foreman of the jury, or to the company-sergeant-major among the departments of State. In addition to its primary duties as one department among others, it has the far-reaching secondary responsibility of supervising its colleagues.

The main functions of the Treasury follow from its general duty to secure economy in the expenditure of public money. But since economy means not only spending as little as possible, but spending as well as possible, these functions are capable of—and receive—a wide extension. Without the authority of the Treasury no estimates can be presented to Parliament; throughout the year it is engaged in discussion with the spending departments as to their requirements for the ensuing financial exercise; it maintains a continuous and minute control over all matters of finance and establishment throughout the public service;[1] it is continuously engaged in investigating the possibility of economies

[1] An Order of Council of 1910 provides that "it shall be competent for the Treasury to direct, should they see cause, that inquiry be made at intervals of not less than five years into the pay and numbers of officers employed by any department of State."

and guarding against waste or extravagance; and without Treasury authority there can be no departure from the service and financial regulations of which it is the principal author. In short, the Treasury may be variously described as the General Staff of Government, as the Ministry of Economy, or as the Ministry of Business. It almost seems, in fact, as though, owing to the complexity of Government business, and to the party discipline and preoccupation of the House of Commons, the Treasury has now come to discharge the most effective part of the critical functions which formerly belonged, and theoretically still belong, to Parliament. If a department wants to spend money, it is broadly true to say that the principal obstacle it has to face is not the House of Commons, but the Treasury. It is easy to understand that the Treasury check diminishes in effectiveness in proportion to the political interest of the proposed expenditure or to the persuasiveness of the technical departmental arguments by which it is defended.

Historically, the Treasury is the department of the Lord High Treasurer, one of the ancient high officers of State. Since the resignation in 1714 of the last of the Lord High Treasurers the office has always been in commission, its duties being entrusted to the Treasury Board, which is appointed by letters patent under the Great Seal whenever a new Ministry is formed. The Board is composed of the First Lord, the Chancellor of the Exchequer, and several (in the present and late Ministries five) Junior Lords. The First Lord is generally the Prime Minister, and has practically no departmental concern with Treasury business. The Junior Lords also have little departmental business, being chiefly employed as Government "whips." Canning said that the duty of a Junior Lord was "to

make a House, to keep a House, and to cheer the Minister." In practice the Treasury Board does not meet. In short, the Minister of Finance, and real successor of the Lord High Treasurer, is the Chancellor of the Exchequer. Of great importance also is the Chancellor's principal lieutenant, the Financial Secretary, who, though not a member of the Board, has in effect the status of a Minister and is regarded as being an early candidate for Cabinet office.

§ 7

Eight of the principal departments are administered by seven Secretaries of State. One Secretary has charge of the twin offices of the Dominions and the Colonies, whose separation is marked by the fact that they have distinct under-Secretaries. All of these high officers bear the same title of "one of His Majesty's Principal Secretaries of State"—the term "principal" referring not to any primacy over the other Ministers, but to their superiority to subordinate secretarial servants of the Crown. Though the office has more ancient antecedents, it first became important in the reign of Henry VIII, and the present full title was first used of Sir Robert Cecil at the end of Elizabeth's reign. But it is as Members of the Cabinet, and since the Cabinet replaced the Privy Council as the real Council of State, that the Secretaries have ceased to be what their name implies and have become responsible Ministers.[1]

[1] There are two modern officials whose position, involving no constitutional responsibility, is reminiscent of what that of the King's Secretaries formerly was: the King's Private Secretary, and the Secretary to the Cabinet. The former position has, in the past, when the King's intervention in State business was more pronounced, excited uneasiness. "Much discussion took place in 1812, when the Prince Regent employed a *Private Secretary*, as to the constitutional position of such an officer. The House of

Until the end of the eighteenth century there were in general two Secretaries. In 1782 the number was increased to three, and has since then been further expanded till it has reached the present number of seven. The distinguishing peculiarities of the office of Secretary of State consist in the facts that it is not limited by the terms of any commission or patent of appointment, and that subject to trifling exceptions, the Secretaries all have the same powers, and any one of them can act for any other. As regards the exercise of the prerogative, this is a matter of Common Law; and when powers are given by Act of Parliament they are usually expressed as conferred upon "the Secretary of State," or on "one of His Majesty's Principal Secretaries of State." Like the Chancellor, the Secretaries are appointed by the mere act of the King in handing to them the seals of office. "By the grant and the delivery of the seals, everyone of these persons becomes a legal organ to countersign any act of State, and he is placed afterwards in that department of business which His Majesty thinks fit to allot for him."

The Secretaries of State for India, War, and Air are assisted by Councils of which they are respectively the presidents, and in many cases the powers of the department are vested, not exclusively in the Secretary, but in the Secretary of State in Council.

§ 8

Like the Treasury, the Admiralty is in form ad-

Commons was assured that he was quite incapable of receiving the royal commands in the constitutional sense of the words or of carrying them into effect." On the other hand, it would appear that, for official, though not for constitutional purposes, the Secretary to the Cabinet has authority to convey the decisions of the Cabinet to the departments.

ministered by a Board, which represents an ancient high officer, the Lord High Admiral, of whom the last example was seen in the person of the Duke of Clarence in 1827. Unlike the Treasury Board, the Board of Admiralty contains no purely nominal members, and actually meets for business. It is composed of the First Lord, who is a Cabinet Minister, two other political members, namely, the Parliamentary Secretary and the Civil Lord, and several non-political members, who do not change with the Ministry, including the four Sea Lords, who are admirals, and the Permanent Secretary.

Three of the Departments of State are styled Boards—the Board of Education, the Board of Trade, and the Board of Works. Until ten years ago there were two more, the Local Government Board, and the Board of Agriculture and Fisheries, both of which were transformed in 1919 into Ministries, the former under the title of the Ministry of Health. None of the still existing Boards has more than a nominal existence, their power being exercised by their presidents in the two first instances, and by the First Commissioner, in the third.[1]

§ 9

There is no part of our modern machinery of government which is more deserving of attention than the Civil Service. Though we hear something during the eighteenth century about excise officers, postmasters, and "tide-waiters," chiefly in connection with political corruption, it is not till well on in the new age which

[1] It is related that at a time when the Archbishop of Canterbury was a nominal member of a Departmental Board which in practice never met, a question was asked in Parliament as to the regularity of his attendance; to which the Minister replied that he was happy to be in a position to say that His Grace had attended on every occasion on which he had been summoned.

was ushered in by the Reform Bill that "His Majesty's Civil Establishments" began to expand in numbers and to acquire prestige to the degree with which we are familiar.

There are two principal dangers which may threaten a Civil Service; one is that it shall be too independent: and the other is that it shall be insufficiently so. The former danger is illustrated by the experience of France, where, before the Revolution, the great majority of the offices under government had become the property of their occupants, indefeasible, heritable, and saleable—a system which was one of the most potent causes of the *débâcle* of the monarchy. The other danger is illustrated in America, where there prevails the so-called "spoils system," under which large classes of civil appointments under the federal government are treated as rewards for political services, with the result that the holders are removed on a change of administration.

Owing to the prejudicial effect on the recruiting of the service, and on the accumulation of technical experience, this system is much criticised, and reformers are seeking to abolish it. From the abuse of proprietary offices England has, on the whole, ever since the Middle Ages, been kept remarkably free. The only modern example is found not in the Civil Service, but in the Army Commissions which, until the system was abolished by Royal Warrant in 1871, were saleable.

The practice of dismissing the civil servants of the Crown on a change of Ministry does not seem at any time to have become prevalent.[1]

[1] It seems, however, that it was not uncommon, until as late as the 'sixties, for ambassadors to be removed on a change of administration. Cf. Queen Victoria's Letters, Second Series, Vol. III, p. 93. In 1880 Sir Henry Layard was removed from the Embassy at Constantinople, on Mr. Gladstone's Government taking office.

The chief abuse from which the Civil Service suffered until the middle of the last century was that of being the instrument of patronage in the hands of Ministers, appointments to offices under the Crown being placed at the disposal of Members of Parliament who supported the administration. The Parliamentary Secretary to the Treasury still bears the title of the Patronage Secretary. This system, of which the Duke of Wellington said that "the only question about local patronage is whether it shall be given to the disposal of one gentleman or another," is said to have come into existence as a corollary to Cabinet Government, and it prevailed in full force till the first blow was dealt against it by the report of Sir Charles Trevelyan and Sir Stafford Northcote in 1853. Energetic effect was, however, not given to their report till 1870, in which year, by an exercise of the prerogative, expressed in an Order in Council, all the public offices under the Crown (except the Foreign Office and the Education Department) were thrown open to public competition.

The status of the Civil Service is governed by the principle that its members are outside politics. Even its highest members are not the constitutional advisers of the Crown, are not responsible to Parliament. They are, of course, removable for misconduct or incompetence; but they are not removable for faults of policy. All Parliamentary criticism is directed to the Minister of the department concerned, and he must take full responsibility for everything done in his name, unless the action complained of is a case of obvious personal misconduct by a subordinate, and does not imply general administrative mismanagement. A strong instance of the view taken by a conscientious minister of the measure of this responsibility is afforded by Sir Austen Chamberlain's resignation of the office of

Secretary of State for India in 1917 as a result of the revelation of mismanagement of the medical services in the Mesopotamian Campaign, which were administered by the Indian Government. Here the Minister was removed by two steps from the service which was at fault.

Conversely, the non-political character of the Civil Service is affirmed by the rules which preclude its members from taking part in political conflicts. Civil servants are not only (in general) ineligible by law for the House of Commons—peers are under no similar disqualifications—but by regulation are forbidden to be candidates.

And again, conversely, since the object is to secure an experienced and therefore a practically permanent Civil Service, and to concentrate public responsibility upon the shoulders of political and temporary chiefs, it is an essential understanding that civil servants shall be equally zealous in their service to successive Ministers of whatever political party. An Order in Council of 1884 recites "that the members of the service remain free to serve the Government of the day without necessarily exposing themselves to public charges of inconsistency or insincerity."

CHAPTER VIII

PARLIAMENT

"Le parlement est la Court du Roy et le plus haut court que il ad."—*Year Book of* 19 *Henry VI.*

"The liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the people of England."—Protestation of the Commons, 1621.

§ 1

THE English Parliament is one of the capital facts not only of our national history, but of the history of civilisation; and the study of its growth from small beginnings to unquestioned sovereignty has formed, as might be expected, the subject of profound scholarship and of an extensive literature in many languages. To this great theme we can devote but a brief passage.

The parliaments which have been set up in modern times in other countries generally appear as the product of revolutionary movements. The typical story is that of an autocratic King, who, though equipped with a standing army and an effective civil service, is compelled, as the result of bad administration, military defeat, or democratic propaganda, to abdicate his power in favour of a popular assembly. Such was not the origin of the English Parliament. To understand how our Parliament came into existence we must carry ourselves back in thought to a time when the King's moral claim to sovereignty was much greater than his physical power; when his generals, his soldiers, his governors, his tax

gatherers and his policemen were all part of the general public; and when he had no more the power or the idea of conducting the government without the help and consent of the free men whose lord he was, than a modern landlord has of improving the methods of farming his estate without the co-operation of his tenants, or a modern Prime Minister of carrying out a policy without the counsel and agreement of his party. And just as a party leader to-day seeks the opportunity given by a party congress of explaining his plans and of confirming his authority, so the mediæval King called his subjects to his council, in order to enlist their indispensable help in money, in military force, and in civil power. In an age when a possible rivalry for rightful sovereignty between the King and an assembly of his subjects could hardly enter the imagination of men, when attendance at the King's Court was an irksome burden rather than a privilege,[1] the gradual expansion of the King's Councils from being assemblies of the greater barons till they included, first, representatives of the smaller landowners elected in the county court, and then the burgesses representing the chartered boroughs, was prompted rather by motives of propaganda than by any idea of political abdication.

[1] In 1368 the borough of Torrington successfully petitioned the King to be relieved of the duty of sending burgesses to Parliament. On one occasion the two knights who had been elected to represent Oxfordshire forthwith fled the country. In the fourteenth century the King was moved to impose or to threaten heavy penalties upon peers who disobeyed the summons to Parliament. On the other hand, the Charter of the Forest allows a nobleman, who is journeying to or from the King's Council, the privilege of taking one deer in the royal forest. There is a Statute of Henry VIII, still in force, which forbids Members of the House of Commons leaving before the business is finished without the licence of the Speaker and the House, on pain of forfeiting their wages.

The King in his Council had a higher authority than the King alone, just as to-day in a colony the Governor in Council has a higher authority than the Governor; except that in the thirteenth century we must not inquire too closely whether the sovereignty of the King in Council was legal, political, or moral. And as the King in Council had more weight than the King, so "the King in his Council in his Parliament" had more of sovereignty than either. And this amplified royalty was concerned not only with making general laws or with imposing taxation; no part of government was in essence foreign to it. The King's Court, whether we are speaking literally of his palace, or figuratively, of the organ of his administration, is the seat of his power. The Parliament is an augmentation of the King's Court; it meets in the King's palace, to do his business, and to lend, in its occasional sessions, the weight of national approval to his more arduous resolutions, whatever be the categories, legislative, judicial, or administrative, into which modern theory would sort them. Parliament is still, to-day, the highest court of law; it is still the grand inquest of the nation; and by its private bill procedure (to which we believe that the practice of no parliament of more artificial origin offers a parallel) it still provides remedies not only for purely local needs, but for strictly personal grievances.[1]

[1] Though at the present time private bills are mostly concerned with the powers of municipalities, railway companies, and similar bodies, Parliament has never ceased to deal, by private bill, with the affairs of private persons. Until well on in the last century neither naturalisation nor divorce could be effected except by this means. The following is a random example of an "Estate bill." A private Act of 1913 is entitled "An Act to authorise the sale of certain pictures bequeathed by the will of the late most honourable Jane St. Maur Blanche, Dowager Marchioness Conyngham, as heirlooms, and to declare the trusts of the proceeds of such sale and for other purposes."

§ 2

Though the momentous steps of summoning representatives of the towns to a national conclave was taken by Simon de Montfort in 1265, the history of Parliament as an established national institution is regarded as beginning with the Parliament summoned thirty years later by Edward I. The Parliament of 1295, which was known to later times as the "Model Parliament," because such in subsequent generations it was held to be, was composed of the three estates of the realm, clergy, barons, and commons, "those who pray, those who fight, and those who work." The archbishops, the bishops and the abbots, the earls and the barons, were summoned by personal writs. The counties were represented each by two knights of the shire, the cities each by two citizens, the boroughs each by two burgesses. The writs directing the return of the knights, citizens, and burgesses, which were addressed to the sheriffs of the counties, laid emphasis upon the necessity of their having full powers, "so that the aforesaid business (for which they were summoned) may not in any way fail for lack of this manner of authority."[1]

That Parliament was evolved from an even more comprehensive body which included the King's Council is illustrated by the fact, already mentioned, "that Privy Councillors, even if not members of either House,

[1] Professor Ernest Barker has suggested that the idea of political representation, so fundamental in the institution of Parliament, was borrowed from the Church, and particularly from the organisation of the Dominican order (*The Dominican Order and Convocation*). The idea had already been made use of in the organisation of the county government in the county court, before it was adopted for the construction of the national Parliament.

have the right to be present at debates in the Lords," and by the fact that the judges, the law officers, and the Masters in Chancery are still summoned there by "writs of assistance." It is true that these dignitaries, if they are not peers, lost long ago the right to vote in the Upper House, and do not now, in fact, attend there; but so late as well past the middle of the eighteenth century the judges were regularly present when the House of Lords was sitting.[1] "A judge is still addressed as 'my lord' because the high court of justice in which he sits is, in spite of its removal from Westminster Palace to the Strand, an historical part of the high court of Parliament, of which the judges are lords."[2]

§ 3

If not from the beginning of the existence of Parliament, certainly within the first half-century or so, the Commons adopted the practice of sitting apart from the Lords in a place by themselves.[3] It was of capital importance in our history that the knights of the

[1] Campbell relates that in 1770, when a second attempt was made to induce Sir Eardley Wilmot, Chief Justice of the Common Pleas, to accept the Chancellorship, "as he happened to be in attendance in the House of Lords, the Duke of Grafton, little dreading a rebuff, came up to him, and, pointing to the great seal, said, 'There it is, Sir Eardley, you shall have it in your possession to-morrow.'" Madison, in the *Federalist*, speaks of the judges in England as being, "so far connected with the legislative department as often to attend and participate in its deliberations." Less than a hundred years earlier the Lord Keeper addressed a peremptory rebuke to the judges for their irregularity in attendance.

[2] Pollard, *Evolution of Parliament*, 24.

[3] The House of Commons does not take its name from the fact that it represents the common people, but from the fact that it represents "les communes," the organised communities, the counties and the towns.

shires, "girt with their swords," who in France would have been regarded as *noblesse*,[1] and who with us, until well on in the nineteenth century, were regarded as the greater men, should thus have made common cause with the merchants from the towns. It both signified and confirmed the rejection of caste as the basis of our political life. In their withdrawing to a secret conclave among themselves—and importance was attached to its secrecy—the Commons formed themselves, as it were, into a Committee outside the assembly of Parliament proper; and forms and titles still survive which point to the fact that, historically, a meeting of the House of Lords is a meeting of Parliament in a sense in which a meeting of the House of Commons is not. The judicial power, the right to call for the advice of the judges, are to-day rights of the Lords alone; the "Clerk of the Parliaments" is the title of the clerk of the Upper House. When the Speaker comes to the House of Lords to hear the royal assent given to a bill, he is, in theory, coming back into the plenary assembly where alone formal and conclusive business can be done; and when the House of Commons is cleared of strangers, a Peer, if present, withdraws with the rest from a committee at which his membership of Parliament gives him no right to be present.

[1] One Henry Gymber, having been elected Knight of the Shire of Huntingdon in 1450, his election was declared void because his coat-of-arms could not be discovered at the Herald's office, and the Garter-King-at-Arms would not certify that he was of gentle birth. The knights of the shire were girt with a sword in the county court, were privileged to wear boots and spurs in the House, and to attend Court in leather breeches and top boots. The ceremony of girding with the sword is said to have been observed until the Redistribution Act of 1885 broke up the county constituencies into divisions.—Porritt.

§ 4

It was the policy of Edward I to include the whole body of the clergy, through their representatives, in the national Parliament. Consequently, the bishops were directed to bring with them to the Model Parliament the heads of their cathedral chapters, their archdeacons, one proctor (procurator) for the clergy of each cathedral, and two for the clergy of each diocese. But though this precedent has been followed in subsequent Parliaments down to the present day, the royal policy was defeated by the reluctance of the clergy to fall in with it. The bishops and abbots recognised an obligation of attendance in respect of the military or "baronial" tenure of their lands; but the lower clergy were under no such obligation; and they preferred to content themselves with their own purely ecclesiastical assemblies, the convocation of the northern and southern provinces of York and Canterbury. "The clergy did not like the plan of being mixed up with the laity. They were the holders of great wealth; they had to bear a large share of taxation—but they preferred to deal with the Crown separately, to vote their taxes in their own provincial and purely ecclesiastical convocations. Thus they missed the chance of becoming a large element in what was going to be the sovereign body of the realm. Parliament, instead of being an assembly of the three estates, became an assembly of Lords, spiritual and temporal, and Commons." It was the settled tradition of the abstention of the general body of the clergy from Parliament (combined with the exclusion of the abbots which resulted from the dissolution of the monasteries) which enabled Henry VIII to carry the Reformation. The clergy continued to tax themselves in Convocation

until 1664, when they elected to be taxed by Parliament.[1]

§ 5

Parliament, then, is composed not of the King and three Estates of the Realm, but of the King and two Houses.

The House of Lords is composed of (1) the Lord Chancellor, who, if a peer (which he always is), is a Member without summons, and presides over the House by prescriptive right; (2) about 700 hereditary peers of the United Kingdom; (3) the two Archbishops, the Bishops of London, Winchester, and Durham, and twenty-one other bishops in order of seniority; (4) sixteen Scottish peers elected by their order for the duration of the Parliament; (5) twenty-eight Irish peers elected by their order for life; and (6) six Law Lords or "Lords of Appeal in Ordinary," who in addition to being salaried judges, holding office on the same terms as other judges, have the rank and privileges of barons for life.

The notion that a summons to London to advise the King in his Parliament, is a right, which is hereditary, and involves "nobility," was of slow growth. "In Edward I's day . . . it may be that there are many men who, unable to foresee that their blood is being 'ennobled' for ever and ever, are not best pleased when they receive a writ which tells them that, leaving their homes and affairs, they must journey and labour in

[1] "It was first settled by a verbal agreement between Archbishop Sheldon and the Lord Chancellor Clarendon, and tacitly given into by the clergy in general, as a great ease to them in taxation. . . . Gibson, Bishop of London, said to me that this . . . was the greatest alteration in the Constitution ever made without an express law."—Speaker Onslow, in a note to Burnet's *History of His Own Time*.

their King's service, and all this at their own cost." At the present day it is a matter of law that a man who can prove that his ancestors received and obeyed a summons to Parliament, has thereby proved that he is a "peer of Parliament" and so entitled to a summons. But since the eighteenth century the regular method of creating a peerage has been by letters patent under the Great Seal, which (though the patent says nothing about Parliament) carries, in the case of a peerage of the United Kingdom, the right to be summoned.

The power of the Crown to create hereditary peers is unlimited, and in modern times has been used with great freedom. At the accession of George III there were only 174 peerages, but during his long reign 388 new ones were created. The House of Lords thus became "the stronghold, not of blood, but of property, the representative of the great estates and great fortunes which the vast increase of English wealth was building up." The power to create peers has formerly made it possible for Ministers to overcome the resistance of the Upper House to their policy. It was actually used by the creation of twelve Tory peers in 1711, in order to secure approval of the Peace of Utrecht. It was effectively threatened on two subsequent occasions to secure the passage of the Reform Bill, in 1832, and to carry the Parliament Act in 1911. This use of the Prerogative, though admittedly only justifiable in the most exceptional circumstances, has generally been held to be constitutional. But in view of the provisions of the Parliament Act it may be thought unlikely that the advisers of the Crown will ever again have occasion to consider resorting to this method of securing the assent of the House of Lords to a reiterated verdict of the electorate.

The question has been raised whether the heir to

a peerage may refrain from applying for his writ of summons to the House of Lords, and by so doing, if he is a Member of the House of Commons, retain his seat there. The subject was discussed in 1894, when the late Lord Coleridge (being then a Member of the Commons), on the death of his father, applied for and obtained the Stewardship of the Chiltern Hundreds, a step which in the ordinary case would vacate his seat. Mr. Joseph Chamberlain called the attention of the House to the fact that their acquiescence in this step involved the recognition that Lord Coleridge's seat had not been, *ipso facto*, vacated by his accession to the peerage.[1] Women, of course, can be peeresses in their own right; but, it was held in 1922 by the Committee of Privileges that, in spite of the Sex Disqualification (Removal) Act, 1919, Viscountess Rhondda, who had petitioned the Crown for a writ of summons, was not entitled thereto. Lord Birkenhead, giving the opinion of the Committee, said in effect that there was no disqualification for the Statute to operate upon. The petitioner was "a person who for her life holds a dignity which does not include the right of a female to exercise that function at all." She was not "a person who has an incident of peerage but is disqualified from exercising it by her sex."

In old days the Lords possessed the right, at any rate if the King's licence had been obtained, to vote by proxy. This curious privilege was suspended by a Standing Order of 1868, which enacted "that the practice of calling for proxies in a division shall be discontinued, and that two days' notice be given of any motion for the suspension of this Standing Order."

[1] The present Lord Selbourne sought, in vain, in the following year, to evade the exaltation resulting from his succession to his father's peerage.

§ 6

The House of Commons is now composed of 615 members, of whom 528 represent English and Welsh constituencies, 74 come from Scotland, and 13 from Northern Ireland.

All British subjects, of either sex, and from whatever part of His Majesty's dominions they may come, are eligible for election to the House of Commons, provided they do not fall within any one of the following disqualified classes :—

(1) Minors and lunatics.
(2) Bankrupts.
(3) Persons convicted of treason or felony and sentenced to more than twelve months' imprisonment (until they have purged their sentence, or been pardoned).
(4) Parliamentary candidates who have been found guilty of corrupt practices: they are for ever disqualified for the constituency where the offence was committed, and for seven years for anywhere else.
(5) Clergy of the Church of England, the Church of Scotland, and the Roman Catholic Church.
(6) Peers of England, Scotland, and the United Kingdom (but peers of Ireland are not disqualified for sitting for constituencies in Great Britain, if they are not representative peers having seats in the Lords).
(7) The holders of certain offices under the Crown.

The subject of the disqualification of persons holding salaried office under the Crown has a long and complicated history. It was at one time a subject of concern to the House of Commons to protect itself from the

influence which the Crown was continually seeking to exercise by conferring pensions and profitable offices upon its members. The Act of Settlement went so far as to lay down that "no person who has an office or a place of profit under the King shall be capable of serving as a Member of the House of Commons." If this rule had remained law, the development of Cabinet Government would have been impossible.[1] Happily it was repealed before it could take effect, and was replaced by the Statute of 6 Anne, which is the basis of the present law on the subject. This Statute made a distinction between old offices already in existence, and new offices which might be created in the future. Tenure or acceptance of a new office—to which was assimilated the receipt of a Crown pension "during pleasure"—rendered the beneficiary incapable of being a member of the House of Commons. Acceptance of an "old" office vacated the recipient's seat; but, save for certain exceptions, this forfeiture could be cured by re-election. Upon this groundwork there has been built a complicated body of Statute law. In course of time it came to be perceived that the Cabinet system and popular government had deprived the danger of Crown influence of much, if not all, of its reality; and in modern times the concern of Parliament has been not to protect itself from corruption, but to keep the servants of the Crown out of politics. There are still many offices, the holders of which are by Statute ineligible for seats in

[1] The provision of the American Constitution, article 6 (2), that "no person holding any office under the United States shall be a member of either House during his continuance in office" was inspired by the same fear of the corrupt influence of the executive as actuated the authors of the Act of Settlement. It has, of course, had the effect of making it impossible for members of the President's Cabinet to be members of Congress. There is no "Treasury Bench" in either House of Congress.

the House of Commons; of these the most important are the judges. But more general and equally effective are the administrative rules of the Government service, which lay down that no person employed by the Crown shall become a parliamentary candidate until he has retired or resigned. From this rule are excepted only certain classes of reservist officers and men of the forces, certain classes of persons employed "in an industrial capacity," and, last but not least "persons holding political offices." To put it briefly, then, the present rule is that no servant of the Crown is eligible for a seat in the House of Commons unless he is a "minister," that is, unless he is one of those sixty or so persons who "come in and go out" with the Government.

Until very recently it was the rule that Ministers in the narrow sense, that is to say Secretaries of State and other heads of departments, should, if appointed to their offices after election to Parliament, forfeit their seats and be required to offer themselves for re-election. In spite of the inconvenience of this rule, the House of Commons was attached to it, and long resisted proposals for its repeal. At last, however, it was provided by an Act passed in 1919 that a Minister appointed to his office within the first nine months of a new Parliament should retain his seat without re-election; and in 1926 the final step was taken, and it was enacted that appointment to ministerial office, whenever made, should be without effect upon the Minister's seat.

§ 7

According to the ancient theory, service in the House of Commons was like jury service, not a right but a duty. To be elected, it was by no means necessary to have been willingly, or even knowingly, a candidate;

and once elected a member had, in the old days, no choice but to serve.[1] No one could resign unless with the permission of the House, which was not readily granted, even in cases of illness. It was not till the eighteenth century that the ancient principle was broken through. In 1715 an ingenious person discovered that the Act of 1705, which vacated the seat of a person who accepted an office under the Crown, could be made use of for the purpose of resignation. From the year 1751 onwards till the present day a particular office, of purely nominal importance, the "Stewardship of the Chiltern Hundreds," has been adopted as the regular door of escape.[2] A Member who wishes to resign his seat applies to the Chancellor of the Exchequer for appointment to one or other of these offices, and, unless it appears that the applicant is seeking to avoid the effect of a less creditable disqualification, such as bankruptcy, his request is granted as a matter of course. It is a matter of interest that this was not always the practice. The patronage which freed members from the tie to a particular constituency—they not infrequently wished to change, for example, from a borough to the more exalted qualification of a county constituency—was a

[1] "In the Parliament of 1554 (*temp.* Philip and Mary) thirty-three Members of the House of Commons withdrew "when they saw the majority was inclined to sacrifice everything to the Ministry." The Court resented this withdrawal, and ordered the Queen's Attorney-General to indict the seceders in the King's Bench. On an information being there preferred against them for departing from the House without licence, contrary to the King and Queen's inhibition at the beginning of the Parliament, six of the seceders "were so timorous as to submit to the mercy of the Court, and paid fines. All the rest, among whom was that famous lawyer Plowden, traversed; but judgment against them was prevented by the Queen's death.'"—Porritt, I, 239.

[2] The equally nominal "Stewardship of the Manor of Northstead" is now also available to Members who desire to resign.

favour which Ministers reserved for their supporters; members of the Opposition might apply in vain. When, in 1775, George Grenville brought in a bill to enable Members to resign without going through the form of appointment to an office, the proposal was opposed by Ministers on the ground that unless the Crown retained control, the opposition might desert the House *en masse* and so bring about what would nearly amount to a general election. Four years later J. C. Jervoise, the Member for Yarmouth, having applied without success for the Chiltern Hundreds, in order that he might stand for Hampshire, discovered a means of outwitting the Minister; this consisted in procuring himself to be appointed as "agent" to a militia regiment, an office which combined the advantages of vacating his seat and not lying in the Minister's gift. Ever since then the requisite patronage has been available without party bias.

No means has yet been invented of enabling a constituency to enjoy the converse right of dismissing an unsatisfactory member.

§ 8

In the early days of Parliament, Members, again like jurymen, were entitled to wages, and had a writ to enforce their claim against the county or the borough they represented. As membership of Parliament became increasingly an object of ambition, it became correspondingly common for candidates to let it be understood that their election would involve no expense to their constituents, and the parliamentary wage fell into desuetude; the last Member to receive his regular salary was Andrew Marvell, the poet, who represented Kingston-on-Hull in the Restoration Parliament; he

drew 6s. 8d. a day. The Common Law right to this stipend has never been abolished by Statute; but it is less than the £400 per annum paid out of the Exchequer, to which, since 1911, Members have been entitled by annual vote; and there might nowadays be some difficulty in ascertaining who precisely was subject to the Common Law liability, especially in the county divisions.

§ 9

Parliament, in an abstract sense, is a permanent institution, which, with occasional brief intervals of suspended animation, goes on from generation to generation. But in a more concrete and accurate sense of the word, a Parliament is a temporary body, which is brought into existence at a general election, and terminates at a dissolution. In early days a Parliament would last only for a few days or weeks; it often happened that the King would summon more than one Parliament in the same year; in 1340 there were three Parliaments, and in 1328 there were four—and in each case there was a fresh election. The idea of keeping the same Parliament in existence for a long period, and calling it together from time to time in "sessions," divided by "prorogations," is said to have been invented by Richard II, who "packed" his Parliaments, and liked to keep a well-disposed body once he had secured it. When the idea was once established that a Parliament which had been allowed to separate could be called together again by a proclamation, and without the issue of fresh writs, and the holding of fresh elections, it came to be understood that a Parliament, once called into being, remained in existence, unless dissolved, until the demise of the Crown. The "Cavalier Parliament,"

in the reign of Charles II, lasted for eighteen years. In 1694, six years after the Revolution, the Triennial Act was passed, which provided that no Parliament should last longer than three years. This Act remained in force until the first year of George I's reign, when "the succession to the throne was in dispute, rebellion was still smouldering in the north, and there was risk of an invasion. Under these circumstances, and not perhaps from any theoretical preference for septennial over triennial elections, Parliament prolonged its existence to a term of seven years." The Septennial Act remained law until 1911, when the Parliament Act replaced seven years by five as the maximum duration of a Parliament. The undoubted power of Parliament to prolong its own existence was, however, illustrated very shortly afterwards. During the Great War, Parliament lengthened its own lease of life no less than four times, bringing it up finally to seven years and six months. In fact, however, the dissolution which immediately followed the Armistice anticipated by half a year the extended duration with which Parliament had endowed itself.

The ancient identity of a "session" with a "Parliament" has left traces which are still of importance. The general rule is that no business can be carried over from one session to another. Bills which have passed through some but not all their stages in one session, but are not yet ripe for the royal assent at the prorogation, fall back into limbo, and have to be reintroduced again in the next session if their promoters wish to proceed with them; "a sponge is passed over the parliamentary slate." Exceptions are made only in favour of impeachments, and of judicial proceedings on appeal before the House of Lords; in both these cases proceedings are carried on not only from session to

session, but from one Parliament to another. Permission is also not infrequently given for private bills, the procedure on which is of a judicial character, and expensive to the promoters, to be carried on from session to session, and even into a new Parliament. The enforced abandonment of a substantial part of the Government's legislative programme, which is a common consequence of the rule, is known as the "Slaughter of the Innocents." It is not easy to understand why the practice is adhered to. The most plausible explanation seems to be that it is regarded as a convenient and inoffensive way of clearing the Government decks of top-hamper which Ministers have taken up half-heartedly to please their supporters.

§ 10

It would be untrue to say that the whole business of the nation is transacted at Westminster. But it is in the High Court of Parliament that our common concerns are made spectacular, ceremonial, and popular; it is in Parliament, and more particularly in the House of Commons, that the national business is brought into the full light of publicity, summed up, and reviewed. The business done by Parliament is of three kinds: financial business, legislative business, and the criticism of the administration. The control which the House of Commons fought successfully to secure for itself over the national finances is historically the source of its pre-eminent authority, and, indirectly, of the ultimate sovereignty of the electorate. But this financial control has no longer the vital importance it once had. The Ministers of the Crown and the Commons are no longer two independent bodies, drawing their strength from different sources, and straining in different

directions at a common chain. Supplies have never once been refused since the Revolution of 1688. The party system of government implies a necessary harmony between Ministers and the House of Commons, and the relation between them may be compared to that which would exist between a jury and the Counsel for the Crown if the former had elected the latter and were concerned for his success; the forms of persuasion are meticulously observed, but the verdict is seldom in doubt. Nevertheless, these forms are of importance, if only because they secure the continuous and detailed public explanation and justification of the financial measures of government. They are governed by the following principles:

(1) No taxes are levied and no expenditure is incurred save under the authority of an Act of Parliament.

(2) All financial business, whether directed to the raising or to the spending of money, is originated by the Crown alone; all money is granted to the Crown, at the request of the Crown, to be spent by the Crown.

(3) The initiative and the final authority in all matters of finance lie with the House of Commons.

Though all taxes and all expenditure require the sanction of Parliament, expressed in a Statute, it is not the case that all the items in the annual national balance-sheet are voted afresh every year. A large proportion of the annual revenue is raised under Acts which are permanent until Parliament otherwise determine. An important exception is the income-tax. More noticeable is the fact that certain heads of expenditure are also authorised by permanent laws; this is the case with the King's Civil List, the salaries and pensions of the judges, and the interest on the National Debt. These payments represent either obligations of national good faith, or, as in the case of the judges' salaries, remunera-

tion for services of such a nature that it is undesirable that an opportunity should be afforded by an annual vote for their discussion. It is usual for the renewal of old or the imposition of new taxes to be approved by resolution of the House of Commons in Committee on the day on which the Chancellor of the Exchequer makes his Budget speech; and until 1912 it was the practice to treat these resolutions as having the force of law, and to proceed to collect the taxes so authorised. But in that year the late Mr. Gibson Bowles challenged the practice, and brought an action against the Bank of England, in which he asked for an injunction forbidding the Bank to deduct income-tax from the annuities on certain Government stock, on the ground that the tax had not yet been actually imposed by Act of Parliament. The Court of Chancery held that this objection was unanswerable; and as a consequence an Act was passed —the "Provisional Collection of Taxes Act" (1913)— which, subject to various stringent conditions, authorises the collection of Customs and Excise and Income-tax, on the strength of a resolution of a Committee of the House of Commons only.

§ 11

Bills which are not "money bills," bills which do not authorise either taxation or expenditure, may be initiated in either House of Parliament, and by any Member of either House. In point of fact, of course, bills which do not form a part of the Government programme have but small chance of getting through all their stages in both Houses in the course of a single sesssion, which they must do in order to receive the royal assent and reach the Statute Book. Rules of

parliamentary procedure, laid down partly in the "Standing Orders," and partly by the traditional customs of the two Houses, prescribe the various ways and the number of times that bills must be brought forward for debate and vote. These rules, which differ for different classes of bills, are highly complicated, particularly in the House of Commons, and form a serious stumbling-block for the inexperienced member. Though the rules of procedure are entirely subject to the discretion of each House, and might, in general, be changed in any particular at any moment, there are few things in the Constitution which are so strictly observed.[1] Nevertheless, if a bill were to receive the King's assent without having passed through all its stages in both Houses, it is at least doubtful whether a Court of Law would be entitled to dispute its authority as an Act of Parliament. It seems certain that no Court could listen to the objection that some stage of procedure in either House had been omitted. It would perhaps be otherwise if a bill had missed out one House altogether. "In 1844 there were two Eastern Counties Railway bills in Parliament; one had passed all its stages, the other was still pending in the House of Lords, when

[1] "It is a rule, in both Houses . . . that no question or bill shall be offered that is substantially the same as one on which their judgment has already been expressed in the current session." It is an illustration of the tenacity with which Parliament adheres to the settled principles of its procedure that on several occasions on which it has appeared peremptorily necessary to reopen a question already passed upon in the current session, rather than infringe the rule, recourse has been had to a short prorogation, in order that a new session might provide a clean slate. In some instances an express provision has been included in a Statute authorising its modification in the same session. For example, Clause 9 of 56 Geo. III, c. 23, which regulated intercourse with the island of St. Helena as Napoleon's prison, provided "that this Act may be altered, varied, or repealed by any Act to be made in this present session of Parliament." The logical implications are singular.

by mistake the Queen expressed her consent to the latter instead of to the former. The mistake was discovered, and another Act was passed declaring that the bill to which assent had been given should be deemed not to have received the royal assent."

§ 12

The only exception to the rule that bills, to become Acts of Parliament, must have received the approval of both Houses, are those resulting from the operation of the Parliament Act of 1911. This measure, of capital importance in our modern constitutional law, was the outcome of the political conflict which originated with the rejection by the Lords of the Finance Bill of 1909, a conflict which formed the issue at two successive general elections at a year's interval. The Statute, which was finally passed in an atmosphere of the highest political temperature, was designed, in the language of its sponsors, "to secure the undivided authority of the House of Commons over finance, and its predominance in legislation." The principal passages in this momentous Act are as follows:[1]

Preamble.—Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament; and whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis, but such substitution cannot be immediately brought into operation; and whereas provision will require hereafter

[1] The language of the passages quoted has been modified for the sake of brevity.

to be made . . . for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords; be it therefore enacted . . . as follows:—

Money Bills.—If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the Session, is not passed by the House of Lords without amendment within one month . . . the Bill shall . . . be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified. . . .

There shall be endorsed on every Money Bill, when it is sent up to the House of Lords and when it is presented to His Majesty for assent, the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. . . .

Bills other than Money Bills.—If any Public Bill (other than a Money Bill or a bill for extending the duration of Parliament) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not) and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by that House in each of these sessions, that Bill shall, on its rejection for the third time, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto; provided that two years shall have elapsed between the second reading of the Bill in the House of Commons in the first session, and its final passing that House in the third session. When a bill is presented to His Majesty for assent in pursuance of this part of the Act, there shall be endorsed on it the certificate of the Speaker that the preceding provisions have been complied with.

Any certificate of the Speaker given under this Act shall be conclusive for all purposes.

Then finally comes the provision which, in view of the great and novel powers thus given to the House of Commons, is designed to bring it into closer dependence upon the electorate, Section 7: Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715.

§ 13

There is no institution which expresses more faithfully the spirit of our Constitution than does the great office of Speaker of the House of Commons; and curiously enough, the office seems to have followed in its evolution the changes in the position of the Crown. During the first four centuries of our Parliamentary history, from the time of Edward I to that of Charles II, the Speaker was the King's Officer. In substance, as well as in form, it was his mission to manage the House of Commons. It would be a good thing, perhaps, if some of the would-be imitators of our parliamentary institutions could realise that with the exception of rare and revolutionary intervals, the House of Commons has nearly always submitted to be managed by the agents of the Crown. Though always chosen from among the Members of the House, and, in fact, elected by the House, the Speaker was for centuries in practice the nominee of the King, from whom, in addition to his traditional salary of £100 a year, he often received substantial rewards for exceptional services. It was his duty to keep the Commons in order, to prevent their discussing matters displeasing to the Court, to convey to them the King's wishes, and to help Government business through. This royal spokesmanship by no

means detracted from the Speaker's dignity. When Christopher Yelverton was elected to the chair, in 1597, he followed the fashion of the time by begging the House to choose a better man: "Your Speaker ought to be a man big and comely, stately and well-spoken, his voice great, his carriage majestical, his nature haughty, and his purse plentiful." It was not till the reign of George III that the royal influence wholly ceased to be exercised in the choice of a Speaker. With the establishment of party government as a recognised institution, the management of the House of Commons naturally passed to the Treasury Bench, to the "Leader of the House"; and the speakership has shared with the Crown, with the judiciary, and with the permanent services in that striking process by which, the more clearly it has been recognised that political power belongs to party organisations, the more emphatically has it been sought to extricate as much as possible of the machinery of Government from party connections. It is said that "the first of the modern Speakers" was Shaw-Lefevre, who was elected in 1839. Since his time it has come to be understood that the Speakership is a strictly judicial office, wholly divorced from party politics. It is true that when a vacancy occurs, the office is conferred upon a supporter of the party in power; but once chosen, the Speaker is re-elected in each successive Parliament until he retires; and it is generally understood that he shall not be exposed to any contest, either in his constituency or for his Chair. The Speaker is a judge; presiding over the House of Commons, he is called upon not only to apply and to interpret the imposing body of precedent which makes up our parliamentary law, but, by his personal influence and authority, to maintain the dignity of the House, and to preserve both the appearance and the reality of

free, fair, and courteous discussion.[1] The Olympian character with which a fortunate tradition is coming to invest the Speakership is illustrated by the growing tendency to cast upon the Speaker duties, outside those involved in his chairmanship of the House, which call for a combination of exalted authority and indisputable impartiality. The duty of certifying bills under the Parliament Act offer the most striking example. Another example is furnished by Mr. Speaker Lowther's chairmanship of the Buckingham Palace Conference on the Irish crisis in July 1914.

[1] In view of the arduous nature of his duties, it is sufficiently remarkable that the Speaker was absent through sickness only twenty-nine times during the three centuries from 1547 to 1883.—Campion, 54.

CHAPTER IX

THE LIBERTIES OF THE SUBJECT

§ 1

IF the reader imagines that the "subject," of whose liberties we are now going to speak, is only another name for the "citizen," he is not mistaken; but he has jumped at his conclusion. The national society to which we belong has for its members all those who owe allegiance to the King. It is this ancient feudal tie between the liege-man and his Sovereign which distinguishes a British subject, and constitutes our common nationality. And this definition is not a mere matter of antiquarian pedantry: it has practical consequences. One of its consequences is that whoever owes allegiance to the King of England possesses all the rights of a British subject; so that, for example, when the Kings of England were also Kings of Hanover, Hanoverians, not being aliens, were entitled to vote for and be elected to Parliament.[1] But more important is the consequence that, since our law has at all times treated allegiance to the

[1] The "leading case" on this principle is the celebrated case of the "Postnati," Calvin's case, decided in the fifth year of James I. The question at issue was whether an infant born at Edinburgh after the King had inherited the Crown of England, was an alien, so as to be incapable of inheriting lands in England. The decision was in the negative.

King as the thing that matters, as the necessary and sufficient qualification for all the advantages which follow from being English, we have never been led away into drawing a distinction between being subject to the King's sovereignty and being a member of a privileged class of "citizens." A man or woman, of whatever race, who was born in any part of the King's dominions, is eligible for a seat in Parliament, and, on obtaining the necessary residential qualification in a constituency, may vote in the United Kingdom as a parliamentary elector. The significance of this principle is illustrated by the fact that no similar rule exists in France or in America. The idea from which both those great Republics start is that their society is based upon no abject subservience to a monarch, but upon a proud association of the free. The result is that emphasis is laid, as in Rome, upon the privilege of citizenship; and it by no means necessarily follows, when a new country is brought under French or American sovereignty, that its inhabitants are brought *ipso facto* within the privileged circle. The inhabitants of the Philippine Islands are subject to American sovereignty, but they are not citizens of the United States; the Mohammedan inhabitants of Algeria are not French citizens.[1] British allegiance, on the contrary, confers both British nationality and British citizenship; every British subject is *civis britannicus*. Generally speaking, a person acquires British nationality (1) by being born in His Majesty's dominions or on board a British ship; (2) by being born abroad of a British father; (3) by the annexation of the territory of which he is an inhabitant; (4) by the grant

[1] And in both cases, curiously enough, the process by which one who is a mere national may, in certain conditions, be promoted to citizenship, is called "naturalisation," as though he started with being a foreigner.

of a "certificate of naturalisation"; (5) in the case of a woman, by marrying a British subject.

The evolution of Dominion autonomy is producing a necessary consequence in the recognition, within the broad class of British subjects, defined by their common allegiance, of narrower classes of citizens of particular Dominions. In the case of the Irish Free State, birth or prolonged residence in that State is a condition for the exercise of political rights there. Canada has been led to define Canadian citizenship, resting on birth or domicile in the Dominion, for the purposes of the control of immigration, and of protecting Canada's distinct rights in respect of membership of the Permanent Court of International Justice. But Canada does not refuse political rights to any British subject.

The difference between His Majesty's subjects and foreigners peacefully resident in the United Kingdom, in respect of the privileges which they enjoy, lies almost entirely in the sphere of political or public, as distinguished from private, rights. British subjects alone can be Members of the Privy Council, can vote or sit in Parliament, exercise a municipal franchise, or hold any office or place of trust, whether civil or military.[1] British subjects alone have an unqualified right to enter the United Kingdom, and cannot be deported therefrom, except in certain cases under the Extradition Acts, where they have committed a crime in a foreign country. In former times aliens were subject to numerous disabilities, such as the incapacity to inherit or to hold land, even on lease, in England. But at the present day a foreigner living in England enjoys substantially all the

[1] Aliens can, however, be admitted to the professions, including the Bar, though they cannot be admitted as solicitors. Stringent restrictions govern their enlistment in the Army, which, however, strangely enough, are relaxed in the case of men of colour.

rights of a British subject, except only the public capacities referred to above. An alien can be refused admittance to the country; and he can, in certain cases, be deported by order of a court; but so long as he is peaceably and lawfully resident in the country he is said to owe "temporary allegiance" to the Crown, and enjoys the full protection of our laws.

§ 2

Liberty, in England, has meant three different things; it has meant parliamentary government, and the limitation of the prerogative; it has meant the minimising interference with people's freedom in matters of opinion, of contract, trade, and social habit; and it has meant, and means, the Rule of Law.

The ideals of toleration in matters of opinion, and of *laissez-faire* in other departments of life, have a history of their own. The influence they have exercised, the hold they have gained, and lost, over legislation, has been fluctuating; and the question how far, even at the present day, the prevailing public sentiment on the subject of legislative interference with private liberty is a part of the common "constitutional conscience," and how far it is a matter of ordinary political opinion, is not easy to answer. It is perhaps safe to say that the constitutional conscience would nowadays condemn any repression of religious or political faith as such; whereas legislation restricting liberty in the interests of social policy of a less idealist kind would rarely be condemned, or effectively attacked, on grounds of constitutional principle. The distinction is perhaps that between freedom of discussion and persuasion, and freedom of action. The former is much nearer to our constitutional heart than the latter.

We come, then, to the great principle known as the Rule of Law, which, though it concerns form rather than matter, the manner in which authority is exercised rather than the objects it is directed to realising, is an essential part of our tradition of liberty, and a fundamental general characteristic of the English Constitution.

The Rule of Law, which a century of conflict with the Stuarts definitely established as an integral part of our constitutional code, means, of course, something more definite than that the law of the land must be obeyed, by those who exercise no less than by those who submit to authority. When, for example, under the Licensing Act of 1662, the Lord Chancellor, or a Secretary of State, refused permission for the publication of a book, this, according to our ideas (and those of Milton), was an oppressive interference with liberty; but it was perfectly lawful. When the King of France sent people to the Bastille by a *lettre de cachet*, far from offending against the law of France, he was exercising an undisputed prerogative of the Crown.

The meaning of the "Rule of Law," which it is the merit of England to have established and vindicated, is that whenever public policy requires any restraint to be imposed upon people's liberty to do as they like, that restraint ought to be exercised in *sole reliance upon pre-established law impartially interpreted.* The Rule of Law confines power to the legislator and to the impartial judge; no room is left for the exercise of any uncontrolled discretion, or indeed, strictly speaking, of any discretion at all, to be exercised in the carrying out of the law by the executive power. The business of the executive official is confined to giving effect to the precise terms of the law, subject to the supervision of the courts, and without his having any latitude to shape

his action by considerations of policy. The Rule of Law may be oppressive; it may involve, for example, the enforcement of laws as illiberal as those formerly applicable to dissenters, or as harsh as the old Game Laws; but it secures two things of capital importance to liberty and to honest and public government: (1) it compels policy to come into the open and to declare itself; and (2) it prevents powers given for one purpose being used for another.[1]

It may fairly be claimed that in almost all matters of importance touching our personal liberty, in mind, body, and estate, this fundamental principle of free government is respected. We shall in a moment look at some of its principal applications; but before doing so we may pause to consider certain limits to the sway of the Rule of Law, if only for the purpose of seeing more plainly what exactly is in issue. In the first place, there are certain exceptions with which we are familiar. It may well be that the censorship of plays by the Lord Chamberlain is, all things considered, a desirable institution; but it is a derogation from our principle. The Lord Chamberlain exercises powers so general, that the propriety of his action in any given case is immune from the possibility of criticism in any court of law. Then, again, we occasionally read in the papers that somebody has been refused a *visa* or a passport to visit India or a foreign country. The discretion thus exercised by the Secretary of State is directed by considerations of policy which are not laid down in any law or controllable by any judge. The same thing is true of the power of the Home Secretary to order the detention of letters in the post. In all these cases we

[1] This statement may err on the optimistic side. If it were absolutely true, we should not see persons suspected of murder being kept under repeated remands on a minor charge.

find liberty interfered with for reasons of State or of public order, which are neither promulgated in general terms beforehand, nor stated when the power is exercised, nor open to review by a neutral arbitrator, indifferent to everything but respect for rule. It may, indeed, well be the case that a meticulous and undeviating observance of the Rule of Law in all circumstances is impossible. One cannot imagine the directions given by the police, or by the Port of London Authority, for the control of traffic, in the streets or on the river, being subjected to review on their merits by the judges; and even in the courts of law themselves we may witness very decorous and unimpeachable exceptions to the strict Rule of Law, when the judges are called upon, as they frequently are, to exercise a purely discretionary authority; the custody of children in matrimonial cases may serve as an example. No hard and fast rule of constitutional propriety can be laid down; there is no question that the Rule of Law, as we have defined it, is a general principle of great importance in the English Constitution; but the guardianship of this, as of other fundamental principles, is entrusted to public opinion. There is no danger of that opinion being pedantic; it is important that it should be alert.[1]

[1] The Lord Chief Justice, in his recently published book, *The New Despotism*, has called attention to the inroads upon the Rule of Law which result from the numerous examples in recent legislation of power being given to Ministers to adjudicate in controversies between the Crown and the subject without giving their reasons, and free from any judicial or other neutral control. A certain derogation from the integrity of the Rule of Law may perhaps be seen in the discretionary power with which the Crown and other public authorities are invested *de facto* as regards the enforcement of the criminal law. Prosecutions are in practice rarely instituted save on the initiative of the police or other public

§ 3

There are as many ways of interfering with personal liberty as there are ways of exercising it; but the most serious interference is undoubtedly the deprivation of the liberty to go and come where we please; it is certainly not the case that liberty is "brightest in dungeons." Even to-day there is no exercise of power which more readily excites public feeling, and brings law and policy into conflict, than arrest, internment, imprisonment, or deportation. In former times the power, or claim, of the King in Council to imprison was regarded as a necessary part of the royal prerogative, and James II regarded the Habeas Corpus Act of 1679 as the destruction of the royal authority.

One of the most famous, characteristic, and effective institutions of our law, the prerogative[1] writ of Habeas Corpus, has for its object the protection of His Majesty's subjects from all unlawful restraint of their bodily freedom. "If a man be imprisoned by another a *habeas corpus* can be granted to those who imprison him, for the King ought to have an account rendered to him concerning the liberty of his subjects, and the restraint thereof." Derived from the Common Law, this ancient instrument has been fortified by several Acts of Parliament, of which the most famous is the Act of 1679, just referred to. This Act was largely provoked by the then recent scandal of Francis Jenkes, who, having been committed to prison by the Privy Council for a political

authority; and a statistical investigation would, it may be conjectured, probably reveal signs of the operation of policy in the selection of the types of offences deemed proper for repression.

[1] Habeas Corpus is called a "prerogative writ" because it is an "extraordinary remedy," which is issued not as a matter of routine, but only by the order of a judge on cause shown.

speech advocating the summoning of a Parliament, was unable for a long time to persuade any judge or court to grant him the writ. Among other important provisions this Statute prescribes that where any person is detained or imprisoned upon the pretext of a criminal charge (other than treason or felony "plainly or specially expressed in the warrant of commitment") an application may be made on his behalf to the Lord Chancellor or to any of the judges (whether in vacation or in term time) for the issue of the writ, directing the officer in whose custody the prisoner is detained to bring him forthwith before the Court. The judge must then, within two days of the return (and under a penalty of £500 payable to the person aggrieved), discharge the prisoner, with or without bail, unless his imprisonment proves to be lawful and unbailable. The Bill of Rights, in 1689, strengthened the efficacy of this remedy by its famous prohibition of "excessive bail"; and an Act of 1816 extended the scope of the statutory procedure to cases of confinement on other pretexts than arrest or imprisonment on a criminal charge. It is important to observe that this notable institution does no more than establish a swift and peremptory procedure for the trial of the question whether the petitioner's imprisonment is legal or illegal, and secure his admission to bail or his prompt trial (unless he is already under lawful sentence) in the former event, or his immediate liberation if his imprisonment proves to be unlawful. The law relating to the writ of Habeas Corpus does not deal directly with the causes for which a person may be lawfully confined, though the principles governing this subject have, of course, frequently been expounded and developed by the judges in proceedings on the writ. In fact, of course, there are a variety of cases in which one person may, with the full authority of the law,

deprive another of his liberty. In the first place there are the cases governed by the criminal law, where the prisoner is held under lawful arrest or remand awaiting trial, or is undergoing the sentence of a competent court. Then there is the ancient and extraordinary power of the High Court judges to commit offenders to prison for contempt of court, a power exercised either by way of punishment for disorderly or insulting behaviour or disobedience to a judicial decree, or by way of coercion, to overcome recalcitrancy. Parliament also has the power, exercised by the Speaker's warrant, to direct persons to be taken into custody by the Sergeant-at-Arms, or be committed to detention for a contempt. Confinement by order of the House of Commons terminates with the session, but the House of Lords has the wider power of committal for a definite period, independent of a prorogation. Lunacy, infancy, being subject to military or naval law, being a prisoner of war, in certain cases being a sufferer from an infectious disease, all these constitute possible reasons for lawful restraint of liberty, and provide adequate returns to a writ of Habeas Corpus. On the other hand, a man may not lawfully constrain the freedom of his wife—unless perhaps if she is on the point of eloping. This was decided in 1891, in proceedings on Habeas Corpus in the case of the Queen against Jackson. The right to liberty is not confined to His Majesty's subjects. This was illustrated in the case of Napoleon, whose detention, first on board the *Bellerophon*, and then at Saint Helena, presented a serious problem for the constitutional lawyers of the day. It was argued, though not very convincingly, that we had been at war, not with France, but with the "Corsican usurper"; and that he remained perpetually a prisoner of war. The knot was finally cut by the passing of an Act of

Parliament to legitimate his imprisonment.[1] A classical case on the right to freedom is that of James Sommersett, the negro, decided by Lord Mansfield in 1772. Sommersett, having been brought to England from Virginia by his master, and having escaped, was recaptured and taken on board a ship. A writ of Habeas Corpus was served on the captain, and on its return the Lord Chief Justice ruled that "the state of slavery is so odious that nothing can be suffered to support it but positive law.... The black must be discharged."[2] In the dialect of the eighteenth century it was said that "the air of England is too pure for a slave to breathe."

The Crown sometimes finds it necessary, in times of public excitement or emergency, to apply to Parliament for temporary statutory authority to arrest and imprison without trial persons suspected of dangerous associations or sympathies. During the late war power was given to a Secretary of State, under the Defence of the Realm Act, to order the internment of persons of "hostile origin or association." Legislation of this kind is sometimes spoken of as a "suspension of the Habeas Corpus Act"; but this expression is, of course,

[1] 56 Geo. III, c. 22.—While Napoleon was on board Captain Maitland's ship at Plymouth, Sir Francis Burdett, the famous Radical, consulted Sir Samuel Romilly as to the possibility of getting him released by Habeas Corpus, but received a discouraging reply.

[2] One may guess that the authors of the American Constitution had this then recent case in mind when they provided that "no person held to service or labour in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due." That the attitude of a country towards slavery may have little connection with its principles of government is illustrated conversely by the fact that a case similar to that of Sommersett was decided in France in 1738 in the same way as in England—in favour of the slave.

inaccurate. All that such a Statute does is to give temporary and exceptional validity to a particular return or reply to the writ.

§ 4

Second only in constitutional importance to protection against unlawful arrest and imprisonment is freedom of public discussion—the liberty to attack and to defend opinions, the right to proclaim and to preach moral, political, and religious doctrines by speaking, writing, and printing. This liberty is protected by no single outstanding institution such as the writ of Habeas Corpus. The right of free speech rests in England upon two things: (1) upon the Rule of Law and (2) upon a strong national sentiment favourable to this liberty—no unimportant part of our "constitutional conscience." Neither in England nor in any other civilised country do the law or public opinion permit a man to say or to print anything he likes without restriction; words may be as cruel, offensive, and disorderly as acts. The difference between freedom and a system of repression turns upon the degree and the method of the restraint imposed by law. There is freedom where the laws show a general bias and leniency in favour of public debate, and where the necessary minimum of control is exercised by the application of general rules and not by means of a discretionary censorship. "The liberty of the Press," said Lord Mansfield, "consists in printing without any previous licence, subject to the consequences of the law." In the words of a modern writer, "Our present law permits anyone to say, write, and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other

hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment."

Words, spoken, written, or printed, may offend against the law either (1) because they are defamatory, or (2) because they are seditious, blasphemous, or indecent.

Defamatory language may be penalised either in a civil action for damages brought by the person aggrieved, or (if the defamation is of such a character as to be likely to provoke a breach of the peace), by a criminal prosecution.[1]

Seditious, blasphemous, or indecent speech, writing, or printing exposes the offender to criminal prosecution. The only parts of this somewhat involved branch of our law which seem properly speaking to be constitutional matter are (1) certain of the rules relating to "privilege," and (2) the principles governing seditious and blasphemous libels. Words are said to be privileged when they are spoken or published in such circumstances that, even when they are prima facie illegal, their author is, nevertheless, protected from any civil or criminal proceedings in respect thereof. The principal cases of so-called absolute privilege are proceedings in Parliament or in a court of justice; communications between Ministers or with the Crown on matters of State; papers published by order of either House of Parliament; fair, accurate, and contemporaneous newspaper reports of judicial proceedings. The absolute

[1] An important difference between the rules governing the civil action for damages and criminal prosecution is that it is a sufficient defence in the former to prove that the words complained of were true, whereas in the latter the defendant must go further and show not only that they were true, but that it was for the public benefit that they should be published.

privilege attaching to speeches in Parliament does not extend to printed copies circulated outside, as Creevey, the author of the Memoirs, discovered to his cost. Beside the cases of absolute privilege, there are many cases of so-called qualified privilege, when words or statements complained of are actionable only if their author be shown to have been actuated by definite malice and desire to do injury. Examples are: unofficial reports of proceedings in Parliament; reports in a newspaper of proceedings at a public meeting; notices and reports published at the request of a Government office. No criminal prosecution for libel can be instituted (by indictment) against a newspaper save with the previous authority of a judge.

Prosecutions for seditious libel were greatly resorted to in the eighteenth century, that is to say after the last Licensing Act had expired, to curb popular criticism of the institutions and measures of government. The judges held that it was for them to decide whether or no the words used in the alleged libel were seditious, and that the only questions for the jury were whether the incriminated writing had been published by the defendant, and what it meant. As the judges were generally inclined to favour authority, while juries were more sympathetic to criticism of the administration, the change in the law made by Fox's Libel Act of 1792 constituted a notable step in the liberation of the Press. By this Act it was declared that on an indictment for libel, the jury was at liberty to return a general verdict of guilty or not guilty—that is to say, to take out of the hands of the judge the question whether the writing was seditious. Only a few years later, however, in 1811, we find a jury returning a verdict for the Crown in a prosecution for the publication of an article denouncing the use of flogging as a military punishment, in which case the

Judge, Baron Wood, said in his direction, that "the House of Parliament is the proper place for the discussion of subjects of this nature . . . the right to discuss the acts of our legislature would be a large permission, indeed. Is the libeller to come and make the people dissatisfied with the Government under which they live? This is not to be permitted to any man. It is unconstitutional and seditious."

Seditious libel has been defined by a modern authority as consisting of words published with intent "to bring into hatred or contempt or to excite disaffection against the person of His Majesty, his heirs or successors, or of the Government or Constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill will and hostility between different classes of such subjects."

In spite of the somewhat alarming language of this definition, it may be taken as certain that at the present day no prosecution for seditious libel would be initiated, and still less be successful, which did not either contain scandalous defamation of a public person, or constitute a serious menace to the preservation of order. It is now well recognised that, in the words of Bacon, "the punishing of wits enhances their authority; and a forbidden writing is thought to be a certain spark of truth, that flies up in the face of them that seek to tread it out."

A blasphemous libel is matter which "tends to vilify or to hold up to ridicule or contempt the Deity, the Bible, the Book of Common Prayer, or Christianity in general." But to be punishable as such the libel must be scandalous, and intended "to wound the feelings of

believers or to lead astray the uneducated." In the words of Lord Chief Justice Coleridge, "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel"; or, again, to quote Lord Buckmaster, "Blasphemy is constituted by violent and gross language, and the phrase 'reviling the Christian religion' shows that without that vilification there is no offence."

§ 5

Certain principles of our criminal procedure may claim to rank among the "liberties of the subject." If we turn to the fifth and sixth amendments to the Constitution of the United States, adopted in 1791, we shall find an instructive statement of the institutions of English criminal justice which men educated in the Common Law, and writing at the end of the eighteenth century, thought proper to be stamped with a constitutional character. The fifth amendment provides that "no person shall be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law. . . .

And the sixth that "in all criminal prosecutions the accused shall . . . enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

Subject to interpretation, and to some modification for petty offences, this comprehensive statement of principle holds good for the law of England at the present day. As contrasted with other, foreign, systems of law, two features of our common Anglo-Saxon criminal jurisprudence stand out conspicuously: trial by jury, and the "accusatory principle."

Speaking in general terms, trial by jury is a matter of right in all criminal cases where the offence with which the prisoner is charged is punishable with more than a short term of imprisonment; provided that, in some cases, where the offence is triable by a court of "summary jurisdiction" (for example, one of the London magistrates) the accused may have the choice either of standing his trial before the summary court without a jury, or of being sent to the assizes or other higher court, where, at the risk of receiving a heavier sentence, he will have the benefit of a jury.

The "accusatory principle" is stated in words already quoted: "No person shall be compelled in any criminal case to be a witness against himself." It is an old maxim of the English Common Law that "the accused is in the position of a defendant, as against whom the plaintiff must establish his claim—even if that plaintiff is the Crown." Under our law no one who is under arrest, or on his trial, on a criminal charge can be compelled to give evidence, or to answer questions, relating to that charge. And it is the duty of any officer of the law, who is investigating a crime, to warn any person whom he has arrested, or has decided to charge, before putting any question to him, or taking a voluntary statement from him. The warning is to the effect that the accused person is not obliged to say anything unless he wishes

to do so, but that whatever he says will be taken down in writing, and may be given in evidence at his trial.

The opposite system, which obtains in most countries outside the British Empire and the United States, is called the "inquisitorial system." Under this an accused person enjoys no immunity from peremptory questioning, and it is a principal part of the duty of the magistrates and police officers concerned with the investigation of crime to submit suspected persons to searching examination.[1] Prisoners on their trial were formerly not permitted to give evidence. Their mouths were closed, and this fact was sometimes dwelt on to their advantage by their counsel. From 1875 on, a series of Statutes authorised prisoners to give evidence in the case of a few particular crimes. Finally the Criminal Evidence Act of 1898 made them competent (but not compellable) witnesses in their own defence in all cases. In spite of the rule that the prosecutor is forbidden to comment to the jury upon the fact that the prisoner has failed to take advantage of this privilege—a fact which commonly means that he fears cross-examination—juries have become so familiar with the idea that a prisoner is permitted to go into the box, that the principle that he cannot be compelled to do so seems to have lost much of its efficacy.

[1] A French historian has suggested that the preservation of the mediæval accusatory principle in England, and its abandonment in France, were due to the facts that while England refused to admit the Inquisition, France permitted the introduction of this jurisdiction on to her territory; the example of the drastic methods of the inquisitors, which they justified by their purpose of saving souls, perverted the tradition of the French lay courts.

L'ENVOI

F.: Is that all?

N.: Yes; this is the last page. We can go now. I think there must have been a lot of cuts. But I hope your ideas are clearer ?

F.: Well . . . that's as may be. But I'm more than ever convinced that your Constitution is religion without dogma.

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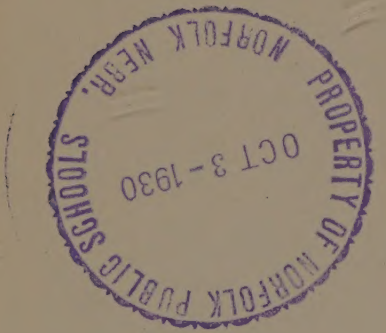

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